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No. _____

In the Supreme Court of the United States

THEODOR SZEHINSKYJ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Government can meet its burden of proof that an American citizen illegally procured his naturalized citizenship without presenting any testimony that the individual had failed to comply with a requirement for naturalization.

Whether the Government can meet its burden of proof that an individual assisted in persecution without offering any evidence of specific conduct.

PARTIES TO THE PROCEEDING

Petitioner

Theodor Szehinskyj is an individual and has no corporate affiliations.

Respondent

The Respondent is The United States of America.

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PETITION

IN THE SUPREME COURT OF THE UNITED STATES

THEODOR SZEHINSKYJ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

The Petitioner, Theodor Szehinskyj, respectfully prays that this Court issue a writ of certiorari to review the judgment of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Third Circuit (App. A, p. 1a) is reported at *United States of America v. Theodor Szehinskyj*, 277 F.3d 331 (3d Cir. 2002). The District Court opinion and order is reported at 104 F.Supp.2d 480 (2000) (App. B, p. 14a).

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on January 7, 2002, and the Court of Appeals entered its order denying a timely petition for rehearing and petition for rehearing *en banc* on April 3, 2002 (App. C, p. 54a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory requirements for citizenship and denaturalization under the Immigration and Nationality Act of 1952 (1952 Act), 8 U.S.C. §1101 et seq., are as follows:

§1427. Requirements of Naturalization

(a) Residence

No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully admitted* for permanent residence, within the United States for at least five years...(emphasis added)

§1429. Prerequisite to naturalization: burden of proof

Except as otherwise provided in this title, no person shall be naturalized unless he has been *lawfully admitted* to the United States for permanent residence in accordance with all applicable provisions of this Act. (emphasis added)

§1451. Revocation of naturalization

(a) Concealment of material evidence; refusal to testify

It shall be the duty of the United States attorney for the respective districts upon affidavit showing good cause therefore, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revo-

cation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: ...

STATEMENT OF THE CASE

Theodor Szehinskyj was issued an immigrant visa and lawfully admitted to the United States on November 24, 1950. He was naturalized pursuant to 8 U.S.C. § 1427(a) by order of the Delaware County Court of Common Pleas in Pennsylvania on March 13, 1958.

In October, 1999, the Government, represented by the Office of Special Investigations (OSI), filed a one-count complaint charging that Szehinskyj was not visa eligible and therefore not "lawfully admitted" when he entered this country in 1950 under the Displaced Persons Act. On that basis it demanded revocation of the order admitting him to citizenship pursuant to 8 U.S.C. § 1451 (a) on the ground that he was not "lawfully admitted"as required under 8 U.S.C. § 1427, and therefore his naturalization was illegally procured.

A. Proceedings Below

On July 24, 2000, after trial, the District Court found that Szehinskyj was not eligible for a visa under the Displaced Persons Act and therefore was not lawfully naturalized in 1958. (App. B, pp. 48a-49a). The District Court revoked his citizenship. (App. B, p. 53a). The order of revocation was affirmed by the Court of Appeals for the Third Circuit on January 7, 2002. (App. A, p. 13a). Szehinskyj's petition for rehearing was denied on April 3, 2002. (App. C, pp. 54a-55a).

B. The District Court's Denaturalization Methodology

The District Court found that Szehinskyj was not visa eligible under the Displaced Persons Act (DPA) of 1948 (62 Stat. 1009), as amended (64 Stat. 219) and that his subsequent naturalization was not "lawful". The court arrived at this conclusion by finding that Szehinskyj was an armed Nazi

concentration camp guard and that this qualifies as assistance in persecution. Thus, the court concluded that since Section 13 of the DPA prohibited issuance of visas to persons who assisted in persecution, then the visa issued to Szehinskyj in 1950 was invalid. This visa invalidity, the court reasoned, resulted in both unlawful admission and naturalization. The Government based its action for citizenship revocation on this methodology.

During Szehinskyj's five-day trial, the Government introduced approximately 140 exhibits extensively detailing the reign of terror of the Nazi regime and the horrific conditions of its concentration camp system. Among these documents there were only six that contain any reference to Szehinskyj. Dr. Charles Sydnor, the Government's expert historian and its only witness, testified that they conclusively show that Szehinskyj was an armed concentration camp guard who assisted in persecution. Although the documents contained various personal identifying information about him, they did not by themselves provide any evidence of specific conduct engaged in by Szehinskyj.

On the sole basis of the testimony of an historian and submission of archival evidence, the Government contended that it had clearly, unequivocally, and convincingly proven that an American citizen had failed to comply with a requirement of naturalization, and that he should be stripped of that right. The District Court, referencing this Court's analysis of assistance in persecution and DPA visa eligibility in *Fedorenko v. United States*, 449 U.S. 490 (1981), agreed and revoked Szehinskyj's citizenship. (App. B, p. 36a).

C. The Court of Appeal's Denaturalization Methodology

The Court of Appeals rejected Szehinskyj's claims that the evidence against him was insufficient and that the Gov-

ernment was required to prove he had made a material misrepresentation in obtaining a visa under the DPA. The circuit court also relied on this Court's interpretation of "assistance in persecution" in *Fedorenko*. It concluded that unlike the case *sub judice*, the *Fedorenko* Court "was not considering an assistance in persecution charge."(App. A, p. 6a). On the contrary, the Court of Appeals pointed out, the Court was dealing with a charge pursuant to section 340(a) of the INA, 66 Stat. 260, as amended, 8 U.S.C. § 1451(a), "which requires revocation of citizenship that was 'illegally procured' or 'procured by concealment of a material fact or by willful misrepresentation,' and section 10 of the DPA, 62 Stat. 1013, which provided that '[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.'" (App. A, p. 6a). Aside from other distinctions between *Fedorenko* and the instant case (mainly involving the strength of the Government's evidence in that case as compared to Szehinskyj's), the methodology used by the *Fedorenko* Court is totally applicable here. The circuit court disregarded this mandated methodology, and charted its own course in affirming the denaturalization of the petitioner.

REASONS FOR GRANTING THE WRIT

I.
THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH A DECISION OF THE SUPREME COURT, OTHER CIRCUITS, AND THE FEDERAL RULES OF EVIDENCE

The Court of Appeal's holding that the evidence was sufficient to denaturalize the petitioner and that a material misrepresentation is not required to invalidate a visa under the DPA cannot be reconciled with Supreme Court precedent, decisions of other circuits, and the rules of evidence. In reaching its decision, the circuit court disregarded fundamental evidentiary requirements that the Government must follow in satisfying its burden of proof in this type of action.

Before revocation of citizenship can be ordered, the Government must prove each and every element of its charge that an American did not comply with a requirement for naturalization through clear, unequivocal, and convincing evidence. Federal courts throughout all circuits have consistently held that the burden of proving the prima facie elements of an asserted claim rests with the moving party. A denaturalizing court cannot extrapolate evidence, including testimony, from other cases and apply it to the case being tried before it. In finding that Szehinskyj was ineligible for a DPA visa and that his admission to this country was unlawful, the trial court was not offered any evidence to support these factual and legal conclusions. Unlike the detailed testimonial evidence of visa ineligibility and unlawful admission reviewed by this Court in *Fedorenko*, the District Court here was offered absolutely nothing by the Government except the testimony of a Nazi-

era German historian. This witness was accepted by the court as an expert on Nazi concentration camps. He was not qualified nor offered as an expert on the DPA or visa processing under that Act. Only a consular officer could testify about such matters. In affirming the trial court's order, the Court of Appeals chose not to address this issue.

In *Fedorenko*, this Court addressed the DPA's locution "assisted in ... persecution" in a denaturalization case. In a painstaking analysis the *Fedorenko* Court reviewed the evidence of persecution which included detailed admissions by the defendant and eyewitness testimony. Based on this evidence, this Court found that the petitioner had assisted in persecution and therefore his actions fell under the proscribed conduct of the DPA. Nevertheless, this Court, in the often cited footnote thirty-four, laid out the parameters of conduct that can be considered assistance in persecution. Based on Fedorenko's own admissions, this Court determined that there can be no doubt that such conduct "fits within the statutory language about persons who assisted in the persecution of civilians." (p. 512). *Fedorenko* instructed, however, that "(o)ther cases may present more difficult line-drawing problems ... ." (p. 512).

While the Government in the present case introduced archival evidence that the District Court determined conclusively showed that Szehinskyj was an armed concentration camp guard, it offered no evidence of any specific conduct engaged in by the petitioner. For example, it did not produce any evidence that proved that he was even armed, except the testimony by its expert that "all concentration camp guards were armed." While such offered and admitted documentary evidence creates a presumption that petitioner may have been an armed guard, it fails to prove it under the required standard of proof. The Government's historian has no personal

knowledge of Szehinskyj's alleged role or actions in the camps. This is not to say that personal participation in atrocities must be proved, as indicated by the Court of Appeals. However, there must be some corroborative evidence that the individual whose name appears on the proffered documents was in fact an armed concentration camp guard. Based on the magnitude of the rights at stake, including a standard of proof akin to reasonable doubt, the Government must be required to introduce such evidence before a court can revoke an American's citizenship.

The Court of Appeals conceded that "similar cases in recent years have involved somewhat more individualized evidence of assistance in persecution than is present here." (App. A, p. 9a). Nonetheless it determined that because of the Government's difficulty in presenting "specific accounts of Szehinskyj's day-to-day activities" due to "the passage of so many years", the Government should be allowed to prevail based solely on the archival documents and the testimony of its historian. (App. A, p. 10a). Such a view is inconsistent with traditional norms of justice and American jurisprudence as well this Court's decision in *Fedorenko*.

A. The Decision of the Court of Appeals Conflicts with a Decision of the Supreme Court.

The Court of Appeals rejected Szehinskyj's claim that the Government must prove that he made a material misrepresentation before his immigrant visa can be invalidated, and his entry deemed unlawful. The court pointed out that such a requirement was not even suggested by *Fedorenko* because that case did not involve "an assistance in persecution charge." (App. A, p. 6a). On the contrary, the court stated, *Fedorenko* dealt with revocation of citizenship which had been "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." (App. A, p. 6a). Notwithstand-

ing that *Fedorenko* dealt with DPA visa ineligibility pursuant to Section 2(b) of the 1948 DPA ("assist[ing] ... in persecuting civil[ians]") whereas this petitioner was charged with a violation of Section 13 of the 1950 DPA ("assist[ing] in the persecution of any person because of race, religion or national origin"), *Fedorenko* most clearly involved the issue of persecution. Most notably, it also dealt with defining the parameters of conduct which qualifies as assistance in persecution.

In *Fedorenko*, this Court followed a progression of steps to arrive at its conclusion that the defendant had illegally procured his citizenship. It first looked at Section 10 of the DPA, which provided that if a person seeking admission made a willful misrepresentation for the purpose of gaining admission under that Act, he was not thereafter admissible. (p. 495). The Court then examined the evidence. Kempton Jenkins, a former vice-consul, had testified that an armed camp guard would not have been visa eligible under the DPA as a matter of law. (p. 499). Jenkins' testimony and conclusions were based on the specific evidence of Fedorenko's persecutory acts. He was testifying about Fedorenko's case, not some other defendant's. Fedorenko also admitted that he had lied to the Displaced Persons Commission (DPC) and the vice-consul to get his visa. (p. 500). Therefore, the Court found evidence that Fedorenko, an armed camp guard, was visa ineligible and that he had made a material misrepresentation to obtain his visa. The Court determined that this was the required DPA Section 10 violation. His "false statements about his wartime activities were willful, material misrepresentations made for the purpose of gaining admission; and ... [u]nder the express terms of the statute, petitioner was 'thereafter not ... admissible into the United States'." (pp. 513-514).

The *Fedorenko* Court then noted that "Section 13(a) [Immigration and Nationality Act of 1924](sic) required a valid

visa and that a visa obtained through a material misrepresentation was not valid." Section 10 of the DPA provided that all immigration laws, including the Immigration Act of 1924, applied to eligible displaced persons. Fedorenko failed to satisfy the prerequisites to citizenship: he did not have a valid visa and, therefore, was not "lawfully admitted". As a result, his citizenship was illegally procured and had to be revoked. In conclusion, the *Fedorenko* Court found that one of the required "jurisdictional facts" (lawful admission) for naturalization "was missing at the time petitioner became a citizen." (pp. 515-516).

Fedorenko is the standard by which a claim of persecution under the DPA must be judged in denaturalization cases. Without question, it mandates that in order to reach a finding of unlawful admission, three predicate facts must be established: visa ineligibility, a material misrepresentation, and visa invalidation. If these three facts are not established by clear, convincing and unequivocal evidence, then illegal procurement of citizenship cannot be proven.

Why would the *Fedorenko* Court, with incontrovertible evidence that Fedorenko was an armed concentration camp guard, need to undertake its painstaking analysis of Section 10 of the DPA to determine that Fedorenko had made a willful material misrepresentation and thus had entered the United States with an invalid visa? Why did not the Court simply determine, based on the statutory language of the DPA and vice-consul Jenkins' "uncontroverted" testimony about its interpretation, that Fedorenko was ineligible for a visa and that his citizenship was revocable as "illegally procured"? The answer lies in the *Fedorenko* Court's clear understanding that a finding of visa ineligibility based on concentration camp service alone was insufficient. A determination was required that Fedorenko entered the United States with an invalid visa.

His visa was invalid because it was secured through a material misrepresentation. This is the vital link between visa ineligibility and unlawful admission. In order to be unlawfully admitted into the United States there must be a violation of some law. Visa ineligibility by itself is not a violation of any law. In *Fedorenko*, the violation of law was the material misrepresentation concerning Fedorenko's concentration camp service. These false statements invalidated his visa and made his subsequent entry unlawful. Support for *Fedorenko's* conclusion that it was the willful material misrepresentation by Fedorenko that rendered his visa invalid and thereby caused his residence to be unlawful is found in this Court's decision in *Kungys v. United States*, 485 U.S. 759 (1988).[1]

The methodology used by the *Fedorenko* Court, in reaching its conclusion that the defendant in that case illegally procured his citizenship because he was unlawfully admitted to the United States, was not followed by the Court of Appeals.

In Szehinskyj's case, there was documentary evidence which the District Court determined showed him to be a concentration camp guard. The trial court concluded, and the circuit court affirmed, that visa ineligibility based on assistance in persecution by itself constitutes illegal procurement. However, in Szehinskyj's case there was no "uncontradicted and unequivocal testimony" by any vice-consul or other official who processed Szehinskyj's, or anyone else's visa under the DPA. There was no testimony that Szehinskyj lied to the vice-consul, Displaced Persons Commission or an immigra-

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[1] "It is a quite different question, not argued here, whether, under the statutes governing the issuance of visas in 1947, Kungys' misrepresentations or concealments at that time *rendered his visa invalid*, thus causing his United States residence to be unlawful, and (since lawful residence is a requirement of naturalization) his naturalization to be 'illegally procured' under that separate provision of §1451(a). See *Fedorenko v. United States*, 449 U.S. 490, 509 (1981)." *Id.* 485 U.S. at 774 n.8.

tion officer about his wartime activities. Without this testimony, the visa issued to Szehinskyj was not invalid and, therefore, his entry into the United States was not unlawful. By not proving these critical facts, the Government's allegations of illegal procurement fall short of the required *Fedorenko* standard. The decision by the Court of Appeals conflicts with the ruling in *Fedorenko*.

Even assuming *arguendo* that material misrepresentation is not required in a case where, as here, the Government only proceeds on an "assistance in persecution" charge, the testimony of a consular officer is still necessary to prove illegal procurement. Evidence of this requirement comes directly from *Fedorenko*. The Court there also had before it a visa "disqualifying" statute (Section 2(b) of the DPA). (p. 510). Through incorporation of the Constitution of the International Refugee Organization (IRO), Section 2(b) "provided that individuals who 'assisted the enemy in persecuting civil[ians]' were ineligible for visas under the Act." (p. 510). The Court, however, persisted in reviewing the testimony of vice-consul Jenkins which provided direct evidence that Fedorenko, based on the facts of his case, would have been ineligible for a visa. Jenkins supported his opinion "based on his firsthand experience as a vice-consul in Germany after the war reviewing DPA visa applications." (p. 510). Regardless of the fact that the Court then proceeded to analyze the issue of material misrepresentation, it still considered the court testimony of a consular officer indispensable to its determination of visa ineligibility. Therefore, even if the Government was not required to show that Szehinskyj misrepresented anything in obtaining a visa, it still had to prove that he was not eligible for it. This had to be done at his trial by testimony from a consular officer.[2]

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[2] An opinion that illegal procurement in *Fedorenko* could have been found without a finding of material misrepresentation is addressed in *Fraud and Materi-*

The circuit court also did not follow the methodology of *Fedorenko* in deciding that Szehinskyj assisted in persecution. The factual analysis of this issue by the *Fedorenko* Court is not found in petitioner's case, nor could it be based on the total lack of any evidence, aside from the documents which place him in the camps, that Szehinskyj assisted in persecution.[3]

B. The Decision of the Court of Appeals Conflicts with Decisions of Other Circuits

In denaturalization proceedings, the Government's burden of proof must be "clear, unequivocal, and convincing and not leave the issue in doubt." *Fedorenko*, at 505. Although this is a civil proceeding, the act of stripping an American of his citizenship is so severe that the Government's burden is "substantially identical with that required in criminal cases—proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U.S. 601, 611-612 (1949); *United States v. Riela*, 337 F. 2d 986, 988 (3d Cir. 1964).

The Government was required to prove that Szehinskyj was an armed concentration camp guard and that he assisted in persecution. It was also required to show that he was visa ineligible and that such a determination had been made by a vice-consul. Finally, it was obligated to prove that the immigrant visa issued to him was invalid and that he had made an unlawful entry into the United States. Federal courts throughout all circuits have consistently held that the burden of proving the prima facie elements of an asserted claim rests with

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ality: Has the Supreme Court Redefined Immigration and Naturalization Fraud?, 62 Temp.L.Rev. 481, 516 (1989).

[3] Nowhere in *Fedorenko* does the Court state or imply that camp guard service is persecution *per se* in every subsequent case. It actually says the opposite (i.e., it focuses on *"particular conduct,"* and advises trial courts *to draw the line* in *"other cases."*).

the moving party. Therefore, the Government was required to prove each and every element of its charge that Szehinskyj did not comply with a requirement for naturalization through clear, unequivocal, and convincing evidence. It is axiomatic that reasonableness and fairness require "that one who brings another into court should have the burden of proving the prima facie elements of his asserted claim." *Liberty Mutual Insurance Co. v. Sweeney*, 216 F.2d 209 (3d Cir. 1954).

In *Fedorenko*, this Court reviewed the testimony of vice-consul Jenkins, who had testified at trial. It is not often that this Court reviews trial court testimony, especially to the degree it did in *Fedorenko*. The reasonable inference from this review is that the *Fedorenko* Court considered it an important element of its ruling. In virtually all of the so-called *Fedorenko* "progeny cases", with the exception of Szehinskyj's, the Government has provided witness testimony (in court and/or by affidavit) to support its claims of visa ineligibility, visa invalidity and unlawful admission.[4] Such evidence has been presented by former vice-consuls and representatives from the Immigration and Naturalization Service (INS), DPC, and IRO. It has been offered in addition to documentary and expert testimony supporting claims of assistance in persecution. In rejecting Szehinskyj's material misrepresentation requirement argument, the Court of Appeals opined that this element is not relevant when an individual is only charged with assistance in persecution. The appellate court cited the case of *United States v. Tittjung*, 235 F.3d 330 (7th Cir. 2000) in support of its position. However, in the *Tittjung* trial, the

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[4] See e.g., *United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D. Ohio 1981); *United States v. Dailide*, 953 F.Supp. 192 (N.D. Ohio 1997); *United States v. Leprich*, 666 F.Supp. 967 (E.D. Mich. 1987); *United States v. Schmidt*, No. 88 C 9475, 1990 WL 6667 (N.D. Ill. Jan. 3, 1990); and *United States v. Tittjung*, 753 F.Supp. 251 (E.D. Wis. 1990).

Government offered the testimony of four individuals (including a retired vice-consul and former representatives of the DPC and the INS), all of whom processed Tittjung's visa under the DPA. 753 F.Supp. at 257. The trial court in *Tittjung* ruled that it need not address the Government's additional claims of material misrepresentation since it determined that Tittjung was ineligible for a DPA visa as a matter of law. However, that court's holding of visa ineligibility was based on documentary evidence, expert opinion testimony (Dr. Charles Sydnor) and the "unequivocal" testimonial evidence from four officials who processed his visa application. *Id.* at 256-57. Therefore, permitting the Government to prevail here without any witness testimony, aside from its historian, conflicts with established evidentiary rules in civil cases, including ones involving revocation of citizenship.

The Court of Appeals also excused the Government's inability to provide "specific accounts" of Szehinskyj's alleged concentration camp service. It believed that the testimony of the Government's expert witness was sufficient. As stated before, Dr. Sydnor has no personal knowledge that Szehinskyj was in the camps or what his specific conduct or role was, if he was there. While this expert witness did render opinions as to the camps and Szehinskyj's alleged activity there, he offered nothing about the critical issue regarding his visa processing and entry to this country. Such testimony is the province of vice-consuls and immigration officers. Given the passage of some 50 years since Szehinskyj was processed for an immigrant visa, such witnesses are probably difficult to find. However, as explained by one court, the "(f)act that proof is difficult to obtain or that a party whose testimony is essential is unavailable does not relieve the party who has the burden of proof from carrying that burden". *In re Malget*, 165 B.R. 933 (Bankr.S.D.Cal. 1994).

There is also no justification for the argument that a court can conclude that the language of Section 13 of the DPA, which provides that visas shall not be issued to those who assisted in persecution, by itself, suffices to establish visa ineligibility, visa invalidity and unlawful admission. Such an assumption would mean that a given court can predict the substance of testimony by a vice-consul, for example, without that person ever appearing at trial. This approach violates evidentiary rules involving burden of proof, and results in a court dealing with the realm of "possibility" and "probability". "Burden of proof requires that evidence indicate that facts, on which recovery depends, actually did occur, not merely that it is probable that they occurred." *Dreijer v. Girod Motor Company*, 294 F.2d 549 (5th Cir. 1961).

In Fedorenko, this Court made findings of assistance in persecution, visa ineligibility, visa invalidity, and unlawful admission based on statutory law and factual testimony. The *Fedorenko* progeny have transformed these interrelated, but distinct elements, into a solely legal question. As a result, all that the Government was required to do in Szehinskyj's case was to point out the visa ineligibility language of Section 13 of the DPA, and get a denaturalization judgment. This is not what *Fedorenko* mandated.

1. Federal Rules of Evidence

In civil actions and proceedings, presumptions can be placed by a court on an opposing party to establish the nonexistence of a presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. However, this imposition of a presumption "does not shift to such party the burden of proof..." *Fed. R. Evid. 301*. The Government introduced documentary evidence that it claimed showed Szehinskyj to be a concentration camp guard. The introduction of such evidence created a presumption as speci-

fied in Rule 301. A rebuttal to this presumption was offered by Szehinskyj when he took the stand and testified that he never served as a concentration camp guard. Obviously, the trial court had discretion to accept or reject Szehinskyj's rebuttal. However, despite the introduction of this evidence by the Government, it still had the burden of proof. As stated, the Government never did offer any witnesses to support its other claims that Szehinskyj lacked a prerequisite to naturalization. Rule 301 does not require Szehinskyj to present witnesses on this issue, for the burden still rests with the Government. Furthermore, it is unreasonable for Szehinskyj to be required to locate government officials who processed his immigrant visa, when the Government is unable to do so. The Government with its enormous resources is unquestionably in a much better position to offer such evidence in support of its claims. *United States v. Continental Insurance Co.*, 776 F.2d 962, 964 (11th Cir. 1985).

II.
THE QUESTION PRESENTED IS IMPORTANT.

The revocation of an American's citizenship is a very serious matter. It results in deportation, loss of social security and medicare benefits, disruption of needed and vital medical care, and separation from family and friends, sometimes forever. The significance and magnitude of the rights at stake in denaturalization cases have been repeatedly addressed by this Court. It has been described as "the total destruction of the individual's status in organized society" and "a form of punishment more primitive than torture." *Trop v. Dulles*, 356 U.S. 86 (1958). During the last 20 years, since this Court's decision in *Fedorenko*, a number of cases similar to Szehinskyj's have been brought by the Government which

have resulted in citizenship revocation. The *Fedorenko* Court provided a detailed methodology to be used in reviewing these types of cases. It acknowledged that other courts may come to different conclusions based on the evidence before them. There is a growing concern among many in this country that this Court's decision in *Fedorenko* is not being followed by lower courts. Based on the facts of petitioner's case, it is submitted that this may be an opportune time for this Court to revisit this area of law.

This case is not only about Szehinskyj. The denaturalization methodology utilized by the District Court and the Court of Appeals will have a profound effect on other denaturalization cases in the future. Not all of them will involve allegations of misconduct during the Nazi-era. Many will involve people who have been law-abiding, hard working, and loyal Americans. Such individuals need to be assured that once citizenship is granted, it can be taken away only with the clearest sort of justification and proof.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Andre Michniak

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Filed January 7, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2467

UNITED STATES OF AMERICA
v.
THEODOR SZEHINSKYJ
a/k/a
FEDOR SZEHINSKI
a/k/a
THEODOR SZEHNISKIJ
a/k/a
THEODOR SZEHINSKY
a/k/a
THEODOR SZEHINSKI
a/k/a
THEODOR SZEHNKYJ
THEODOR SZEHINSKYJ,
Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 99-cv-05348
District Judge: The Honorable Stewart Dalzell

Argued: September 7, 2001
Before: BECKER, Chief Judge, ALITO and BARRY, Circuit Judges
(Opinion Filed: January 7, 2002)

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OPINION OF THE COURT

BARRY, *Circuit Judge:*

Appellant Theodor Szehinskyj participated in what has accurately been described as the Third Reich's "closed culture of murder" which saw millions of victims die in the Holocaust, the "greatest moral catastrophe of our civilization." *United States v. Szehinskyj*, 104 F. Supp. 2d 480, 500-01 (E.D. Pa. 2000). The revocation of his United States citizenship is now before us, with Szehinskyj arguing that he was not what the evidence resoundingly showed him to be—an armed concentration camp guard who "assisted in persecution . . . because of race, religion or national origin"; indeed, he argues that he never set foot in the camps in which it was shown that he served. He argues, as well, that even if the government proved that he was an armed guard, it did

not prove that he made a material misrepresentation on his visa application and, thus, his citizenship should not have been revoked. He is, in a word, wrong.

I.

In 1950, Theodor Szehinskyj, who was born in Poland but claims to be a Ukranian [sic] national, entered the United States, together with his wife and daughter, on an immigrant visa issued to him under the Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 80-774, 62 Stat. 1009, as *amended*, June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219. Eight years later, the Delaware County Court of Common Pleas granted his petition for naturalization, and he became a United States citizen on March 13, 1958.

In 1999, the government filed an action under section 340(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. §1451(a), seeking revocation of Szehinskyj's citizenship on the ground that he assisted the Nazi government of Germany in persecuting individuals because of their race, religion and national origin when he served as an armed Nazi concentration camp guard during World War II. The District Court, after a five-day bench trial, concluded in extensive findings of fact and conclusions of law that Szehinskyj served as a Waffen SS Totenkopf (or "Death's Head") Division concentration camp guard who "assisted in persecution." He was not, therefore, entitled to the immigrant visa he received under the DPA and consequently was not lawfully admitted and eligible for naturalization under 8 U.S.C. §1427(a)(1).[1] His citizenship was revoked. The District Court had jurisdiction under 28 U.S.C. §§1331 & 1345. We have jurisdiction under 28 U.S.C. §1291. We will affirm.

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[1] 8 U.S.C. §1427(a) provides:

> No person . . . shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years.

A. *Material Misrepresentation Not Required*

As suggested at the outset, Szehinskyj raises two issues on appeal: insufficiency of the evidence, albeit with various permutations and combinations, and the failure of the government to prove that he made a material misrepresentation on his visa application. We will deal with these issues in reverse order because the latter issue can be swiftly put to rest. Our review of what is a pure issue of law is plenary.

It is beyond dispute that "there must be 'strict compliance' with all the congressionally imposed prerequisites to naturalization, and failure to comply with any of these terms renders the naturalization illegally procured and subject to revocation under section 1451(a) of the Immigration and Nationality Act." *United States v. Breyer*, 41 F.3d 884, 889 (3d Cir. 1994) (quoting *Fedorenko v. United States*, 449 U.S. 490, 506 (1981)). Because Szehinskyj entered this country under a visa issued to him pursuant to the DPA, the legality of his naturalization ultimately turns on his eligibility under that Act. *Id.*

Section 3(a) of the DPA made immigration visas available to "eligible displaced persons." 62 Stat. 1010. Any person who "assisted the enemy in persecuting civil populations" was excluded from the definition of an eligible displaced person. DPA §2(b), 62 Stat. 1009 (incorporating the definition of displaced person in Annex I to the Constitution of the International Refugee Organization); *see also Fedorenko*, 449 U.S. at 495 & n.3. Section 13 of the Act, the section at issue here, states in pertinent part:

> No visas shall be issued under the provisions of this Act, as amended . . . to any person . . . who advocated or assisted in the persecution of any person because of race, religion or national origin.

DPA, as amended, 64 Stat. 219, 227. Thus, Szehinskyj was not eligible for his visa if, prior to obtaining the visa, he had advocated or assisted in persecution based on race, religion, or national origin. Assistance in persecution constitutes illegal procurement. *Breyer*, 41 F.3d at 889; *United States v. Koreh*, 59 F.3d 431, 438-42 (3d Cir. 1995).

But, says Szehinskyj, the government failed to prove that he obtained his visa because of a material misrepresentation and that this, too, is required. It is not. Whether or not Szehinskyj made, and the government proved, a material misrepresentation is irrelevant, for no such proof is required by the plain language of section 13 of the DPA.

We now make explicit that which has heretofore been implicit in our cases. The assistance in persecution ground for visa ineligibility is an independent ground that does not include a fraud element; once a determination of ineligibility is made on this ground, there is no need to look for and find a material misrepresentation. *United States v. Tittjung*, 235 F.3d 330, 341 (7th Cir. 2000); *cf. Breyer*, 41 F.3d at 889-91 (finding ineligibility without examining whether any misrepresentation occurred); *Koreh*, 59 F.3d at 438-42 (same).

As the *Tittjung* Court explained:

> To adopt Tittjung's reasoning, we would be forced to ignore the plain language of §13(a) of the DPA as amended in 1950, something we cannot do. That Section states that 'No visas shall be issued under the provision of this Act, as amended . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin.' Section 13(a) does not contain a fraud element, but rather provides wholly independent grounds for denaturalization.

The Court concluded:

> Once [the] determination was made [that Tittjung's service as an armed concentration camp guard meant that he had assisted in persecution], the [district] court did not and was under no obligation to assess whether Tittjung had made misrepresentations in order to procure his visa.
>
> Requiring a finding of misrepresentation in order to determine illegal procurement would not only be inconsistent with the plain meaning of [section 13 of] the DPA, but would be in direct conflict with previous federal case law on the matter.

Tittjung, 235 F.3d at 341.

Szehinskyj, ignoring the plain language of the DPA and ignoring *Tittjung*, argues that a material misrepresentation is the jurisdictional fact under which, in *Fedorenko*, the Court predicated the invalidity of the visa before it. But, aside from other distinctions between that case and this, the *Fedorenko* Court was not considering an assistance in persecution charge. Rather, the Court was considering a charge against petitioner under section 340(a) of the INA, 66 Stat. 260, as amended, 8 U.S.C. §1451(a), which requires revocation of citizenship that was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation," and section 10 of the DPA, 62 Stat. 1013, which provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."

Specifically, as relevant to the issue before the Court, Fedorenko was charged with willfully concealing on his visa application (and his application for citizenship) that he had served as an armed guard at the infamous Treblinka concentration camp and had committed crimes or atrocities against inmates because they were Jewish. The government's case rested on the claim that he had procured his naturalization illegally or by willfully misrepresenting material facts. *Fedorenko*, 449 U.S. at 497-98. The one count complaint before us did not allege, as a basis for revocation of citizenship, any such thing but, instead, relied on the independent ground of assistance in persecution. There is nothing in *Fedorenko* that even suggests that in such a case a material misrepresentation must still be proved.[2]

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[2] One final note in this regard. While, of course, at no point did Szehinskyj disclose his wartime service to the Third Reich, courts have had little difficulty, even in a misrepresentation case, finding such a sin of omission to be, nonetheless, a sin sufficient to warrant revocation of citizenship. As the *Fedorenko* Court put it, "we conclude that disclosure of the true facts about petitioner's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible

Szehinskyj's material misrepresentation argument is without merit.

B. *The Evidence was Sufficient*

We now turn to the heart of this case—whether the evidence supported the District Court's conclusion that Szehinskyj was an armed concentration camp guard who "assisted in the persecution of any person because of race, religion, or national origin." *Szehinskyj*, 104 F. Supp. 2d at 493. The District Court's conclusion is based on numerous findings of fact, which we review for clear error, and our review of its conclusions of law is plenary. *Stelmokas*, 100 F.3d at 313. In conducting our review, we must keep in mind that "the right to acquire American citizenship is a precious one," *Fedorenko*, 449 U.S. at 505, and, therefore, the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Id.* (quoting *Costello v. United States*, 365 U.S. 265, 269 (1961)). The evidence for revocation must be "clear, unequivocal, and convincing" and not leave "the issue in doubt." *Id.* (quoting *Schneiderman v. United States*, 320 U.S. 118, 125 (1943)).

We note at the outset that Szehinskyj's response to the evidence against him has shifted. Before the District Court, his story was that he was never a guard at a concentration camp or a member of the SS. Rather, he claimed, he had worked on a farm in Austria as a "slave laborer" from February 1942 until November 1944 for Frau Hildegard Lechner while her husband was on military duty in Russia and, after leaving her, did various unremarkable things. We note that after Szehinskyj had dug in his heels on

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for a visa under the DPA." *Id.* at 509. And, as we observed in *United States v. Stelmokas*, where we considered the case of a Schutzmannschaft officer who represented that he was a teacher:

> In our view, if you falsely represent that your employment is one thing when your actual employment is completely different, then you have concealed your true employment. In these circumstances, it is perfectly clear that Stelmokas himself demonstrates that he made a material misrepresentation when he sought displaced person status and a visa.

100 F.3d 302, 314 (3d Cir. 1996).

this position—according to the District Court, he had supplied Frau Lechner's name as an alibi—somewhat miraculously the government found Frau Lechner, then eighty-eight years old, and her *de bene esse* deposition was thereafter taken. She recalled, clearly and in specific detail, that Szehinskyj left her farm in the late summer of 1942, and how and why he did so. The District Court listed numerous and specific reasons why it credited her "compelling" testimony in its entirety, finding her "completely credible" and "remarkably exact in her answers," with a "precise recollection of dates." *Szehinskyj*, 104 F. Supp. 2d at 495. It also listed numerous and specific reasons why it found Szehinskyj's testimony incredible, not the least of which were the powerful wartime documents which showed, beyond any question, where, in fact, he was during the relevant years and what, in fact, he was doing. But more about those later.

Before us his position somewhat subtly changed. Aside from arguing that Frau Lechner's testimony should not be believed and his should be, Szehinskyj argued not so much that he was not where the documents placed him, but that the documents were not enough to clearly and convincingly show that he assisted in persecution. There were no fact witnesses who pointed the finger at him nor was his signature on any documentation, he complained, and there were no photographs or fingerprints of him. At oral argument before us, there was yet another subtle change, to wit: even if he was there, and even if he was a concentration camp guard at the Gross-Rosen, Sachenhausen, [sic] and Warsaw concentration camps and a guard in a prisoner transport from Sachsenhausen to the concentration camp at Mauthausen, there was no evidence that he was an *armed* guard and, thus, the government did not prove that he "assisted in persecution." Indeed, for purposes of argument, Szehinskyj was effectively willing to concede everything but the "armed" status.

After carefully reviewing the record, we find no reason to believe that the District Court clearly erred in determining that Szehinskyj served as an SS Totenkopf guard. The remarkable con-

sistency of the information contained in the six Nazi wartime documents retrieved from Russian, German, and Ukrainian archives—concentration camp Change of Strength Reports, Troop Muster Rolls, and a Transfer Order—incontrovertibly supports the District Court's finding. Not only did each of those documents identify Szehinskyj by name, but each also noted his date of birth, place of birth, religion, and mother's first and maiden names, making it unlikely in the extreme that the documents referred to a different Theodor Szehinskyj. As the District Court put it:

> Szehinskyj has been convicted by incontrovertible documents, all but one of which did not see the light of Western eyes until after the collapse of the Soviet Union on December 31, 1991. These wholly consistent ancient documents, having reposed for over fifty years in Moscow, Kiev, and Berlin, leave no doubt that this Theodor Szehinskyj was a member of the Totenkopf battalion at the Gross Rosen, Sachsenhausen and Warsaw concentration camps, and almost certainly at Mauthausen and Flossenburg as well. From January of 1943 through at least April of 1945, Szehinskyj was thus part of the Totenkopf guard in at least three venues of the Final Solution.

Szehinskyj, 104 F. Supp. 2d at 500. The testimony of Frau Lechner provides further corroboration of the story outlined in the documents, as does the consistency of those documents with yet other documents. Based on this evidence, the District Court found "without hesitation" that the Theodor Szehinskyj before the Court and the Theodor Szehinskyj mentioned in the Nazi documents were identical. *Id.* at 499. We reach the same conclusion.

Szehinskyj argues, however, that even if he did serve as a concentration camp guard, the government presented no proof that he was armed and no proof of any other specific conduct that constituted assistance in persecution. We disagree. Szehinskyj correctly notes that similar cases in recent years have involved somewhat more individualized evidence of assistance in persecution than is present here. *See, e.g., Breyer*, 41 F.3d at 890 ("The

record is uncontroverted that [the defendant] was a trained, paid, uniformed armed Nazi guard who patrolled the perimeters of two such camps with orders to shoot those who tried to escape."). Lacking specific accounts of Szehinskyj's day-to-day activities in the SS Totenkopf,—accounts increasingly difficult to obtain given the passage of so many years—the government chiefly relied on the testimony of Dr. Charles Sydnor, a respected Holocaust scholar, to show beyond peradventure that Szehinskyj was armed based on the fact that he was a concentration camp guard. Beyond Dr. Sydnor's testimony, the record is replete with accounts of the inhuman orders carried out by members of the Death's Head Battalion in which Szehinskyj served, including the accounts of four survivors of the camps involved in this case.

The District Court, in a comprehensive opinion, synopsized this evidence, graphically describing the "horrifyingly clear picture of life in the concentration camps" in which Szehinskyj was shown to have served and the survivors' "vivid living testimony of what a nightmare a prisoner's daily life was" in those camps—camps which were a "thoroughly considered, meticulously organized enterprise of state-sponsored murder." *Szehinskyj*, 104 F. Supp. 2d at 487 & 500. We could not improve on that description and will not attempt to do so. Instead, we will quote the relevant portions virtually in full, deleting the citations to the record and the notes in margin, some of which make the case that Szehinskyj had to have been armed even more powerfully.

> The Nazis, under the direction of Hitler, SS Head Heinrich Himmler, and Himmler's protege, Theodor Eicke, created three basic types of concentration camps under the exclusive control of the SS: confinement and slave labor camps, extermination camps, and, as the war progressed, combined slave labor and death camps. Conditions in the camps were inhuman: disease was rampant, sanitation, medical care, and heat were nonexistent, and inmates received little food, less than 1,000 calories per day. At labor camps, inmates were made to work eleven- or twelve- hour days in

brutal conditions, even at night in the bitter winter. Prisoners died every day from malnutrition, exhaustion, disease, beatings, suicide, or murder. Many were subject to cruel and deadly medical experiments. One such experiment involved inflicting a flesh wound with a poison-tipped bullet and documenting how long it took the prisoner to die from the poison.

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As is made clear from the survivor accounts . . . the Waffen SS Death's Head Battalion guards were vital to maintaining the terror of the camps. Dr. Sydnor testified that the camps simply could not have functioned without them. The guards, who were uniformed, armed, paid, and given leave, were instructed to shoot any prisoner who attempted to escape. They subjected inmates to both official and unofficial physical punishments as well as verbal abuse and persecution.

•••

All of the guards were armed at all times. An "Instruction on Tasks and Duties of the Guard" circular quotes the General Guard Directive, to wit: "It is forbidden to the guard, unless explicitly determined otherwise, to lay his weapon down." Also, an illustrated instruction book for guards who did not speak German depicts every guard, without exception, holding a gun.

Dr. Sydnor emphasized that Totenkopf guards were not assigned to the same jobs every day at the camps. They had to be able to perform each type of duty-night patrol, escorting inmates to and from work details, guarding them at work, service in the watchtower, patrolling the perimeter of the camp, etc. They also had to be ready at any moment to search for escapees.

The Totenkopf Battalion guards also were used in prisoner transports from one camp to another. On these hellish transports, during which prisoners routinely died, the duty of the guards was the same as at the camps: to make sure no prisoners escaped. Guards surrounded the train cars with

> guns drawn at every stop. ("Wrong/ Right" illustration book depicting guards with guns pointed at prisoners as they board and exit a boxcar). Conditions for prisoners were abysmal, with no heat, food, or sanitation.
>
> While the Nazi documents and Dr. Sydnor's testimony paint a horrifyingly clear picture of life in the concentration camps, the stories contained in the affidavits of four camp survivors offer vivid living testimony of what a nightmare a prisoner's daily life was in the camps involved in this case.
>
> •••
>
> Dr. Sydnor specifically noted that these inhuman conditions, of which we have provided only a flavor, existed at the camps at Gross Rosen, Sachsenhausen, and Warsaw from 1943 through 1945, during Szehinskyj's alleged period of Nazi service. Conditions at Mauthausen and Flossenburg were no better.

Szehinskyj, 104 F. Supp. 2d at 485-488.

It is clear that personal participation in atrocities is not required for one to have assisted in persecution—being an armed concentration camp guard is sufficient. *Fedorenko*, 449 U.S. at 512; *Breyer*, 41 F.3d at 890; *United States v. Kairys*, 782 F.2d 1374, 1377 n.3 (7th Cir. 1986). Indeed, we have found assistance in persecution by an editor who was "armed" only with a newspaper which spewed anti-Semitic bile. In so doing, we recalled the maxim that "the pen is at least as mighty, if not mightier, than the sword." *Koreh*, 597 F.3d at 439.

The District Court found that, given the "horrific" camp regulations and practices, it was "unlikely" that Szehinskyj never physically harmed an inmate. *Szehinskyj*, 104 F. Supp. 2d at 499. This is the only reasonable conclusion to be drawn from the record. Even if he did not, the Court continued, the concentration camp guards all carried guns and were under strict orders to use them, and Szehinskyj was an armed Totenkopf concentration camp guard. "By definition"—and, we add, by "clear, unequivocal, and convincing" evidence—"the Totenkopf assisted in [the] persecution of Jews and others considered racially inferior or 'defective' "

—this was Szehinskyj's "very role at the camp[s]." *Id.* Szehinskyj was, thus, ineligible for a visa under the DPA and could not have been lawfully naturalized in 1958. The evidence clearly supported that conclusion.

II.

The District Court's order revoking Szehinskyj's citizenship and ordering him to surrender his certificate of naturalization will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA
UNITED STATES OF AMERICA v.
THEODOR SZEHINSKYJ
CIVIL ACTION
NO. 99-5348
MEMORANDUM

Dalzell, J. July 24, 2000

The Government has filed this action under Section 340 (a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. §1451, asking us to revoke the United States citizenship of defendant Theodor Szehinskyj because of his alleged service as a Waffen SS Death's Head Battalion concentration camp guard during World War II. After a nonjury trial, this Memorandum will constitute our findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Given the gravity of the relief the Government seeks against this 76-year-old citizen, we must consider in extended detail the evidence developed during his five-day trial. Our canvass regrettably but necessarily must include exposition of grisly details of the horrific concentration camp system that was the soul of the Third Reich.

I. Background Facts and Claims

The Government alleges in its one-count complaint that Szehinskyj served as an armed Nazi concentration camp guard during World War II and therefore was not entitled to the immigrant visa he received under the Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, *as amended*, June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219.[1]

[1] The DPA was specially enacted in 1948 to accommodate the large number of refugees wishing to immigrate to the United States after the war. *See, e.g., United States v. Breyer*, 41 F.3d 884, 889 (3d Cir. 1994).

The legal basis for the Government's argument is discussed below at Part V.

Szehinskyj vigorously disputes these allegations, claiming that he was a slave laborer on a farm belonging to Hildegard Lechner near Schiltern, Austria during the time of his alleged Nazi service. He maintains that he was never a member of the SS.

Szehinskyj was born in Malnow, in the Lvov District of Poland,[2] on February 14, 1924. He considered himself a Ukrainian national and was fluent in both Ukrainian and Polish. He completed about seven grades of school and later worked on his family's small farm. *See* Joint Pretrial Stip. at 22-24.

In December of 1941, Szehinskyj went to Lvov, where he had friends, to look for work because the Soviets had collectivized his family's farm after their 1939 invasion of Malnow. He found work in Lvov chopping wood. *See id.* at 25. In February of 1942, German soldiers captured Szehinskyj and a group of other young people in Lvov, loaded them onto trucks, and eventually transported them to Krems, Austria, near Vienna. In Krems, Szehinskyj was processed in a labor office (*i.e.*, he gave his name and identifying information to labor officials) and then was placed behind a counter with other forced laborers-to-be, where prospective "employers" reviewed them and selected those they wanted. Frau Lechner chose Szehinskyj to work on her remote Austrian farm while her husband was serving in the *Wehrmacht*. *See id.* at 25-26. Before Szehinskyj left the labor office, the officials there explained the work rules to him, *e.g.*, that he could not leave his employer. The *arbeitskarte* (work card) that the Krems labor

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[2] During the twentieth century, the Lvov District was in turn part of the Austro-Hungarian Empire, the Ukrainian People's Republic, the Western Ukrainian People's Republic, Poland, the U.S.S.R., Nazi-occupied Poland, the U.S.S.R., and, currently, Ukraine. Malnow was a town of about four or five hundred families. *See* Joint Pretrial Stip. at 23.

office prepared for him contains an expiration date of January 31, 1943. *See id.* at 27; *see also* Ex. G-24 (Szehinskyj's *arbeitskarte*, bearing the January 31, 1943 expiration date).

Szehinskyj claims that he remained on the Lechner farm until November of 1944. He testified that at that time, he left the farm with a group of fleeing refugees and spent the next several months performing work on different farms, eventually ending up in a displaced persons camp in Vilseck, Germany.

The Government contends that Szehinskyj left the Lechner farm sometime prior to January of 1943, before his Nazi-issued *arbeitskarte* expired. It claims that from January 15, 1943 until the spring of 1945, Szehinskyj served as an armed Waffen SS Totenkopf Division guard at the Gross-Rosen, Sachsenhausen, and Warsaw concentration camps. It also claims that he was involved in a 1945 prisoner transport from Sachsenhausen to the concentration camp at Mauthausen, after which he likely went on to serve as a guard at the concentration camp at Flossenbürg.

In 1950, Szehinskyj entered the United States with his wife and young daughter on an immigrant visa issued to him under the DPA. *See* Ex. G-133 (Szehinskyj's immigration file). After working on a farm in York County, Pennsylvania, Szehinskyj moved his family to the Philadelphia area in the mid-1950s and got a job as a machinist for the General Electric Company, from which he retired in 1984. The Delaware County Court of Common Pleas naturalized him as a citizen on March 13, 1958. *See id.*

II. Summary of the Evidence

A. *The Government's Case*

At the heart of the Government's case are six Nazi wartime documents that, according to the testimony of Dr.

Charles W. Sydnor, the Government's expert historian,[3] specifically identify Szehinskyj as a Waffen SS Totenkopf (or "Death's Head") Division concentration camp guard. These documents are concentration camp Change of Strength Reports[4] for May 1943, September 1943, and May 1944, *see* Exs. G-45, G-61, and G-62; two Troop Muster Rolls,[5] *see* Exs. G-44 and G-63; and a February 13, 1945 Transfer Order, *see* Ex. G-64.[6]

According to Dr. Sydnor, these documents demonstrate that Szehinskyj joined the Waffen SS on January 15, 1943 and was first assigned to the Totenkopf Battalion at the Gross-Rosen concentration camp, located in lower Silesia. On May 19, 1943, he was transferred to Sachsenhausen, in Oranienburg, fifteen miles north of Berlin. *See* Ex. G-45 (the May, 1943 Change of Strength report listing Szehinskyj at line 21). On September 29 of that year, he was transferred to the new Warsaw camp constructed adjacent to the levelled Warsaw Ghetto, *see* Ex. G-61 (Change of Strength report for September of 1943 listing Szehinskyj at line 118). The following May, in preparation for the closing of the Warsaw camp

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[3] We without hesitation qualified Dr. Sydnor as an expert in Nazi-era German history, Nazi policies and practices, and the history of the SS and the concentration camp system. *See* Ex. G-128, at 5-12 (listing Dr. Sydnor's professional qualifications). Rather to the point of this case, Dr. Sydnor's earliest scholarly work was his award-winning doctoral dissertation, "Totenkopf: A History of the SS Death's Head Division", later published by Princeton University Press as *Soldiers of Destruction: The SS Death's Head Division 1933-1945* (1977).

[4] Change of Strength reports were summary personnel records usually prepared monthly to keep an inventory of a particular camp's guards. They listed all of the guards who transferred in and out of the camp in a given month.

[5] Troop Muster Rolls were standard printed forms that contained biographical information about each Totenkopf guard—*e.g.*, name, date and place of birth, religion, marital status, mother's name and residence, occupation, and date of induction into the SS. Camp administrators used them to keep track of their personnel.

[6] We address the authenticity and admissibility of these documents in Section IV below.

because of the Red Army's advance, he was sent back to Sachsenhausen, *see* Ex. G-62 (a Change of Strength report for May, 1944 listing Szehinskyj in line 116); Ex. G-63 (a Troop Muster Roll prepared in the administrative office at Sachsenhausen showing that Szehinskyj arrived from Warsaw on May 4, 1944). He and many other guards left Sachsenhausen on February 13, 1945 to assist on a prisoner transport to Mauthausen concentration camp, about 300 miles south in Austria, *see* Ex. G-64 (a Transfer Order dated February 13, 1945). Dr. Sydnor also testified that Szehinskyj most likely went on to the Flossenbürg concentration camp, though the Government is not seeking to prove this as part of its case. The Transfer Order states that Szehinskyj and the other Totenkopf guards were "to be transferred to the SS Death's Head Battalion of Flossenbürg" after guarding the prisoner transport to Mauthausen. *See* Ex. G-64 (English translation).

The Government's case is also based on the testimony of Hildegard Lechner. Frau Lechner, whose *de bene esse* deposition in connection with this case was taken on February 10, 2000 in Salzburg, Austria, testified that Szehinskyj did work on her farm, but left in the fall of 1942.[7] She remembers selecting Szehinskyj at the labor office in Krems to work on her farm while her husband was fighting with the German army. She stated that she treated him as a member of her family, turned over to him the forty *Deutschmarks* she received from the German government every month, gave him his own little room next to her in-laws, and ate her meals with him.[8] She

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[7] We note that Lechner *volunteered* the dates on which Szehinskyj worked on her farm. During the deposition, Judge Alexander Wagenhofer, who conducted the questioning, asked her if "Theo" worked on her farm "in 1942". Lechner responded, "Yes, from February, 1942 until the late summer of that year." Ex. G-25, at 16.

[8] In fact, she remembers that Szehinskyj loved her sister-in-law's "famous poppy seed noodles." *Id.* at 18.

testified that her two-year-old daughter, Isolde, was very fond of Szehinskyj. *See* Ex. G-25 at 55.

Frau Lechner testified in detail about the day in 1942 when Szehinskyj left her farm:

> [H]e just said that he was leaving. He just put his shoes over his shoulder and walked away barefoot. And I watched him leave for a long time. My daughter even waved to him until he was gone.

Id. at 56-57. After Szehinskyj left, she received another full-time laborer, named "Rudolf" or "Rudek". *See id.* at 45-46. Frau Lechner stated that she never heard from Szehinskyj after he left in 1942.

Frau Lechner also spoke tearfully about her husband, who was missing in action in Stalingrad as of January, 1943. She stated that she received her last letter from her husband in January of 1943, after Szehinskyj had left her farm, and heard over the radio that same month that the *Wehrmacht* had fallen at Stalingrad.

B. *Szehinskyj's Case*

Szehinskyj testified at trial that he is not the man named in the documents. He said that he remained on Frau Lechner's farm until November of 1944, through several growing seasons, and that Frau Lechner did not treat him well, did not pay him, did not feed him enough, and made him sleep in a storage room. He remembers Herr Lechner, a German soldier on the Russian front, returning for three weeks in May of 1942. He also claims to remember Herr Lechner sending home a package from the front lines containing a captured Soviet flag in January of 1943, but stated that he did not recall Frau Lechner ever mentioning Stalingrad.

Szehinskyj testified that in November of 1944, he left the Lechner farm with a large band of refugees who passed through and warned him that, if the Russians found him, they

would hurt him. He claims that Frau Lechner gave him a blanket, some bread, and his expired *arbeitskarte* as he was leaving. He claims that he had never seen the *arbeitskarte* before that moment.

According to Szehinskyj, he boarded a westbound train in Langenlois, near Schiltern, with the other refugees. When the train could go no further because of bombed-out tracks, he found a bicycle and travelled with two other men from farm to farm looking for food and shelter. He eventually went to the "Duerr" farm in the Straubing area of Germany, where he remained until the end of February, 1945. In April or May of 1945, he met a group of Americans, who transported him to a refugee camp in Vilseck, Germany. In mid-July, he left for Amberg, Germany to work in a sanitarium for people with tuberculosis. In December of 1946 or early 1947, he went to Neumarkt, where he met and married his wife. He returned to Amberg in 1947 to work as a mechanic in the United States Army's motor pool. His daughter, Anna, was born in a displaced persons camp in Amberg in 1948.

Szehinskyj also claims that an injury to his right hand would have prevented him from holding or firing a gun. According to his testimony, the Soviets who invaded Malnow in 1939 put him to work building a railroad, and he pierced his hand when he dropped a scythe on it during the construction. The injury caused him to lose feeling in his right hand and index finger and this prevented him from clenching his hand all the way.

He also stated that he has never had a tattoo.

III. The Concentration Camp System[9]

Dr. Sydnor testified that concentration camps first came into existence in 1933, when Adolph Hitler and the Nazi Party

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[9] Because the nature of the concentration camps is integral to our holding that Szehinskyj "assisted in persecution" within the meaning of the DPA, we discuss it in some detail here.

came to power. As the Nazis tightened control of their growing empire, the use of *Schutzhaft*—"protective detention" — became more and more common. Early in Hitler's reign, the camps were filled in large part with members of political parties thought to be inimical to the Nazi ideology. In the years that followed, the inmate population shifted to those groups thought to be racially undesirable, with the primary focus rapidly turning on the Jews.

The Nazis, under the direction of Hitler, SS Head Heinrich Himmler, and Himmler's protégé, Theodor Eicke, created three basic types of concentration camps under the exclusive control of the SS: confinement and slave labor camps,[10] extermination camps,[11] and, as the war progressed, combined slave labor and death camps.[12] Conditions in the camps were inhuman: disease was rampant, sanitation, medical care, and heat were nonexistent, and inmates received little food, less than 1,000 calories per day. At labor camps, inmates were made to work eleven- or twelve-hour days in brutal conditions, even at night in the bitter winter. Prisoners died every day from malnutrition, exhaustion, disease, beatings, suicide,[13] or murder. Many were subjected to cruel and deadly

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[10] Before the war, this type of camp housed inmates from Germany, primarily opponents of the Nazi ideology. After the start of the war, it included inmates from virtually every country in Europe, as well as some Americans. Flossenbürg was a slave labor camp.

[11] At this type of camp, "inmates" were killed upon arrival. Treblinka, Sobibór, Belzec, and Chelmno were extermination camps.

[12] At labor/death camps, which became much more prevalent as the war raged on and the outlook for Germany grew bleaker, the Nazis used inmates as free labor for war-related industrial production and literally worked them to death. According to Dr. Sydnor, the regime saw the inmates as a disposable commodity that was easily replaced. Gross-Rosen was a combined slave labor and death camp where the major economic activity was the operation of a granite quarry.

[13] Dr. Sydnor testified that prisoners generally committed suicide in one of two ways: by running into a zone of the camp where Totenkopf guards had strict orders to shoot them, or by purposely throwing themselves on the electrified fences surrounding the camps.

medical experiments. One such experiment involved inflicting a flesh wound with a poison-tipped bullet and documenting how long it took the prisoner to die from the poison.

In short, the horror of the camps cannot be overstated: they were places of utter, devastating persecution.

As noted above, as the war progressed most inmates were placed in the camps because of their ethnicity or religion, though other groups of inmates included Gypsies, homosexuals, the mentally ill, the homeless, and the unemployed—people the Third Reich regarded as *Untermenschen*, sub-humans.[14] Jews were considered the least desirable and most dangerous of the ethnic groups, followed by Gypsies and Slavs.

As is made clear from the survivor accounts that follow, the Waffen SS Death's Head Battalion guards were vital to maintaining the terror of the camps. Dr. Sydnor testified that the camps simply could not have functioned without them. The guards, who were uniformed, armed, paid, and given leave, were instructed to shoot any prisoner who attempted to escape.[15] They subjected inmates to both official and unof-

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[14] In fact, the prisoners wore colored patches on their uniforms to indicate their "category"—*e.g.*, pink for homosexuals, violet for Jehovah's Witnesses, black for "asocials", etc. Jews wore yellow and red triangles in the shape of the Star of David.

[15] Dr. Sydnor stated that he knows of no case in which a guard was disciplined for shooting without justification, but that a guard could be disciplined for failing to shoot when, in the eyes of the Nazis, a situation required it. *See also, e.g.*, Ex. G-5, at 304 (English translation of the 1933 service regulations for the Dachau concentration camp, which later served as a template for all camps and which state that "[w]hoever lets a prisoner escape will be arrested", but a "guard who shoots an escaping prisoner . . . will not be punished"); Ex. G-35 (English translation of instructions for SS guards stating that prisoners who attempt to flee or who show signs of getting violent are to be shot immediately).

ficial physical punishments[16] as well as verbal abuse and persecution.

Leaders prescribed specific regulations for executions, such as:

> When executing Polish civilian workers and workers from the formerly Soviet area, . . . workers of the same ethnic group in the area are to be led past the gallows after the execution and reminded of the consequences of violating regulations.

Ex. G-22, at 5 (English translation of January 6, 1943 Implementation Regulations for Executions, issued and signed by SS *Reichsführer* Heinrich Himmler). The regulations specified that "[t]he offender is to be asked whether he wishes to stand facing the wall or the firing squad", *id.* at 2, or, if the inmate is hanged, "[t]he protective detention prisoner is to receive three cigarettes for the execution." *Id.* at 3. The regulations also provided that

> Shortly before the execution, the offender is advised in the presence of the participating SS men by the Camp Commandant or his authorized SS officer that he is to be executed. The notification shall be in approximately the following form:
>
> "The offender has done such and such and thus forfeited his life because of his crime. For the protection of *Volk*

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[16] An example of "official" physical punishment was whipping—guards administered twenty-five lashes, which the prisoner had to count out loud. If the prisoner became confused or passed out from the pain, the guard started over. *See* Ex. G-49 (English translation of a Waffen SS circular outlining regulations for whipping punishments and stating that, in certain cases, "the punishment is to be administered to the *naked buttocks*" (emphasis in original)). Whippings were particularly dangerous because prisoners were weakened after the beating, affecting their ability to work. Prisoners who could not work were killed.

"Unofficial" punishments included the "hat game". During marches to off-camp work details, a guard would remove an inmate's hat, toss it to the side of the line of prisoners, and order the inmate to retrieve it. When the prisoner did so, the guard would shoot him for trying to "escape".

and Reich, he is to be dispatched from life to death. Let the judgment be carried out."

Id.

All of the guards were armed at all times. An "Instruction on Tasks and Duties of the Guard" circular quotes the General Guard Directive, to wit: "It is forbidden to the guard, unless explicitly determined otherwise, to lay his weapon down." Ex. G-35, at 4. Also, an illustrated instruction book for guards who did not speak German depicts every guard, without exception, holding a gun. *See* Ex. G-34 ("Wrong/Right" picture book).[17]

Dr. Sydnor emphasized that Totenkopf guards were not assigned to the same jobs every day at the camps. They had to be able to perform each type of duty—night patrol, escorting inmates to and from work details, guarding them at work, service in the watchtower, patrolling the perimeter of the camp, etc. They also had to be ready at any moment to search for escapees.

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[17] The "Wrong/Right" book concludes after the illustrations with the following manifesto from SS *Gruppenführer* Reinhard Heydrich:

> We must work on ourselves. In unprecedented self-discipline we must incorporate into ourselves and follow the eternal principles of the ideology given to us by the Führer. First, we must mentally align ourselves so that everyone thinks the same way about every enemy, that he rejects him right away on principle, without personally making egoistic and sympathetic exceptions. In order to preserve our nation, we must be harsh to the enemy, even at the human risk of hurting an individual enemy and even of being impugned as uncontrolled brutes by some certainly well-meaning people. If we, namely as national socialists, do not fulfill our historical task, because we were too objective and humane, people will still not allow mitigating circumstances in our case. It will merely be said: before history, they did not fulfill their task. If someone is our deliberate opponent, then he is only to be wrestled down as an opponent objectively and without exception. If, for example, every German, out of false sympathy, were to make an exception of just this "one decent" Jew or Free Mason from among his acquaintances, then there would simply be 60 million exceptions.

Ex. G-34, at 17.

The Totenkopf Battalion guards also were used in prisoner transports from one camp to another. On these hellish transports, during which prisoners routinely died, the duty of the guards was the same as at the camps: to make sure no prisoners escaped. Guards surrounded the train cars with guns drawn at every stop. *See, e.g., id.* ("Wrong/Right" illustration book depicting guards with guns pointed at prisoners as they board and exit a boxcar). Conditions for prisoners were abysmal, with no heat, food, or sanitation.

While the Nazi documents and Dr. Sydnor's testimony paint a horrifyingly clear picture of life in the concentration camps, the stories contained in the affidavits of four camp survivors, Exs. G-129-G-132, offer vivid living testimony of what a nightmare a prisoner's daily life was in the camps involved in this case.[18]

Sidney Glucksman, who was twelve years old when the Nazis took him into custody, spent time at three labor camps and was sent to Gross-Rosen sometime in 1943. He spent about a year and a half there, performing various back-breaking jobs, until, after a bombing raid, he was forced to march for several days and nights to the camp at Dachau, where he remained for more than a year, until his liberation on April 29, 1945. Mr. Glucksman recounts horrors such as guards who put small children and babies into bags and smashed them against a wall until the children were dead. Inmates were then given the job of separating the bloody clothing from the bodies.

Rudolf Herz spent two months at Auschwitz in 1944 and then was transferred in a railroad boxcar with no food, water, or bathrooms to Schwarzheide, a satellite camp of Sachsenhausen. At Schwarzheide, he spent twelve hours a

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[18] These affidavits were accepted without objection in lieu of the live testimony of these four survivors.

day doing heavy manual labor, including building bomb shelters and unloading bricks from boxcars. He states that "[t]he work was very hard and the guards . . . sometimes beat us if they thought we were working too slow or just because they wanted to beat us." Ex. G-131, at 3. He also notes that the guards treated prisoners "with utter contempt and no respect for [their] dignity as persons," often referring to them as "Jew pig". *Id.* at 4-5. After he was beaten by a guard and severely injured, he was sent to Lieberose, another Sachsenhausen satellite camp. Mr. Herz's life was spared because the doctor at the satellite camp was away for several weeks, during which time he recovered enough to perform light duty work. He spent the fall and winter of 1944-1945 at Lieberose. In February of 1945, the SS was evacuating the camp, so he left on foot along with hundreds of other prisoners on a week-long "death march" to Sachsenhausen. The Totenkopf guards shot many prisoners along the way, and others died from starvation or exposure. After two weeks at Sachsenhausen, he was loaded onto a railroad car and sent to Mauthausen, where he remained until his liberation on May 5, 1945.

Karl Schlessinger was sent to Auschwitz in 1942 and transferred to Warsaw in the fall of 1943. The Totenkopf guards forced him to clean up the rubble in the former Warsaw Ghetto and, during a severe typhus outbreak in the winter of 1943-44, made him work on the construction of a crematorium. In July or August of 1944, as the Red Army advanced toward Warsaw, he was evacuated from the camp and forced to march for six days without water. The guards then placed him in a cattle car and ultimately sent him to Dachau.

Marion Wojciechowski, a former member of the Polish army, was arrested in April of 1942 and sent to Auschwitz, where he remained until he was sent to Gross-Rosen in March

of 1943. At Gross-Rosen, he worked as the prison secretary and then was assigned to a carpenters' detail outside the main camp. He states that, "[w]ith very few exceptions, the SS troops who guarded outside details were regularly cruel in their treatment of prisoners." Ex. G-130, at 3. In February of 1945, he was evacuated in an open freight car to Leitmeritz, in Czechoslovakia. During the two-week trip, armed Totenkopf guards with machine guns were placed between the freight cars. In May of 1945, he and some other prisoners escaped into Czechoslovakia. *See generally* Exs. G-129-G-132.

As the Red Army moved west, the Nazis had to close camps in the East.[19] The camps west of Poland therefore became choked with prisoners, and conditions deteriorated even more, difficult as that may be to believe.

Dr. Sydnor specifically noted that these inhuman conditions, of which we have provided only a flavor, existed at the camps at Gross-Rosen, Sachsenhausen, and Warsaw from 1943 through 1945, during Szehinskyj's alleged period of Nazi service. Conditions at Mauthausen and Flossenbürg were no better.

IV. Szehinskyj's Motion *in Limine*

Szehinskyj filed a motion *in limine* before trial to preclude the admission of some of the Government's documentary evidence. The motion is based on the hearsay, authenticity, and best evidence rules.

The documents to which Szehinskyj objects include the six wartime Nazi documents that identify him as a Totenkopf guard—the Change of Strength reports for May 1943, September 1943, and May 1944, Exs. G-45, G-61, and G-62, the two Troop Muster Rolls, Exs. G-44 and G-63, and the February 13, 1945 Transfer Order, Ex. G-64. He also objects to the

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[19] Most of the camps were in Poland because of the large numbers of Jews in that region.

admission of three other general categories of documents: (1) judgments in German post-war judicial proceedings; (2) statements of and information relating to other Totenkopf guards; and (3) one set of camp regulations.[20]

A. *Authentication*

Fed. R. Evid. 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As our Court of Appeals has noted, the "burden of proof for authentication is slight." *Link v. Merecedes-Benz,* 788 F.2d 918, 927 (3d Cir. 1986). "[T]here need be only a *prima facie* showing, to the court, of authenticity, not a full argument on admissibility." *Threadgill v. Armstrong World Indus., Inc,* 928 F.2d 1366, 1375 (3d Cir. 1991) (quotation omitted).

Under Fed. R. Evid. 901(b)(8), the "ancient document rule",

> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered [is sufficient to authenticate a document under the rule].

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[20] Specifically, Szehinskyj objects to the admission of the following documents: (1) Ex. G-26, the 1941 Service Regulations for Concentration Camps; (2) Ex. G-28, the 1960 judgment in the Matter of Albert Layer; (3) Ex. G-32, the 1962 judgment on appeal in Layer's case; (4) Ex. G-30, excerpts from the judgment in the 1960 trial of Sorge and Schubert; (5) Ex. G-31, the judgment in the 1960 case against August Höhn; (6) Ex. G-51, the judgment from the 1962 trial of Baumkötter; (7) Ex. G-52, a protocol of a 1946 interrogation of Gustav Wegner; (8) Ex. G-59, the 1946 affidavit of Anton Kaindl; (9) Ex. G-71, the statement of Albert Widmann to an Examining Magistrate; (10) Ex. G-72, a continuation of Widmann's 1959 interrogation; (11) Ex. G-56, a wartime service card for Adalbert Kotsch; (12) Ex. G-107, Kotsch's May 11, 1979 statement; and (13) Ex. G-87, the 1972 interrogation of Simon Kellinger.

Although this rule requires that the document be free from suspicion, that suspicion goes not to the content of the document but rather to whether the document is what it purports to be. *See United States v. Kairys*, 782 F.2d 1374, 1379 (7th Cir. 1986) ("[T]he issue of admissibility is whether the document is a *Personalbogen* from the German SS records located in the Soviet Union archives and is over twenty years old. Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility."); *see also United States v. Stelmokas*, 100 F.3d 302, 312 (3d Cir. 1996).

1. The Six Documents that Identify Szehinskyj

These six documents come from three different archives. The three Change of Strength Reports and the Transfer Order are from the Center for the Preservation of Historical Documentary Collections in Moscow.[21] The September 29, 1943 Troop Muster Roll was prepared at Sachsenhausen and found in the Central State Archives of Ukraine, located in Kiev. And the May, 1944 Troop Muster Roll was found in the German Federal Archives in Berlin.

Dr. Sydnor, whose knowledge on this subject is encyclopedic,[22] testified that there is nothing unusual about any of

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[21] Dr. Sydnor testified that after the war, the Soviet Army captured quantities of German documents and brought them back to Moscow, intending to use them to find subjects for prosecution for war crimes. Most (if not all) of these documents first became available to Western scholars after the fall of the Soviet Union in 1991.

[22] It should be noted that Dr. Sydnor's expertise also includes his primary research and knowledge of the various archives around the world that contain documents such as those he testified about in this case. Those archives include: "the National Archives in College Park, Maryland, Washington, D.C., and Suitland, Maryland, which contain captured German records and U.S. war crimes investigative records; the Federal Archives *(Bundesarchiv)* in Koblenz, Germany, and the Federal Military Archives *(Bundesarchiv-Militärarchiv)*, one of its branches,

these documents.[23] All of them are consistent with the content of other Nazi records of the era,[24] all were found in locations where they were likely to be,[25] and the form of each is consistent in every way with the document being an unaltered original. He also points out that it would have taken a vast conspiracy to alter the documents, since they were located in different archives and contained information about many different Totenkopf members. He notes that it would have been impossible for the Soviets to anticipate fifty years ago that a person would be the subject of litigation in 2000, and there is no indication that the documents were ever used

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in Freiburg, Germany; the former Berlin Document Center, the repository of Nazi Party and SS personnel records; the Central Office of the State Judicial Administrations for the Investigation of National-Socialist Crimes, in Ludwigsburg, Germany, which maintains records of German investigations and trials concerning Nazi crimes; the museums of Dachau Concentration Camp, Auschwitz Concentration Camp, and Mauthausen Concentration Camp; and the library and archives of the Museum of the Ghetto Fighters House (Beit Lohamei Hagetaot) and the Yad Vashem Archives in Israel." Ex. G-128 at 11-12 (Qualifications).

[23] We note that Dr. Sydnor's conclusion is consistent with that of Dr. Raul Hilberg, another distinguished scholar of the Nazi era, in *Stelmokas*. *See* 100 F.3d at 312.

[24] Dr. Sydnor noted that consistency among unrelated documents dramatically increases his, and other historians', confidence in their authenticity.

For example, the name "Adalbert Kotsch" appears along with that of Szehinskyj on the May, 1943 Change of Strength Report, ex. G-45 (listing a transfer from Gross-Rosen to Sachsenhausen) and the September, 1943 Change of Strength Report, ex. G-61 (listing a transfer from Sachsenhausen to Warsaw). Kotsch's camp personnel card, ex. G-56, is consistent with the information on these Change of Strength Reports, as well as with his sworn statement to judicial authorities on May 11, 1979 in then-West Germany. According to Dr. Sydnor, this consistency among unrelated sources strengthens his confidence in the authenticity of the documents and in the reliability of the information about Szehinskyj.

Dr. Sydnor testified to the same effect with respect to Wolodmir Sapotockyj and Simon Kellinger, other former guards whose names appear with Szehinskyj's on the change of strength reports and, in Sapotockyj's case, the transfer order.

[25] For example, Dr. Sydnor testified that the September 29, 1943 Troop Muster Roll was likely to be found in the Ukraine, as Szehinskyj himself is Ukrainian.

by Soviet prosecutors or investigators. And he flat-footedly states that there is no evidence of the Soviets ever falsifying a document to implicate a Ukrainian living in relative obscurity in North America.[26]

Based on this extremely strong expert opinion, we without hesitation hold that the six Nazi wartime documents are properly authenticated under Rule 901(b)(8).[27] Dr. Sydnor emphasized that the condition and location of the documents are completely free from suspicion, and there can be no dispute that they are more then twenty years old. Furthermore, Szehinskyj has offered nothing more than pure speculation in his attempt to cast doubt on the documents—an unfounded allegation that the Soviets tampered with them, which Dr. Sydnor carefully and thoroughly proved wrong. We therefore reject Szehinskyj's challenge to the authenticity of these six Nazi wartime documents.[28]

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[26] In fact, there is no evidence of Soviet falsification even in cases where it would be much more understandable, if no less unethical, for them to have done so. Dr. Sydnor testified that the Soviets had custody of Himmler's office calendar for 1941 and 1942, an historical trophy which came to light after the Soviet Union collapsed. The calendar lists who Himmler saw and what they discussed. According to Dr. Sydnor, if the Soviets had fabricated anything, it would have been this, as a way of causing huge embarrassment in the West during the Cold War (*e.g.*, during the struggle over the installation of U.S. Pershing missiles in West Germany in the 1980's). However, there is no evidence whatsoever of any such sort of Soviet falsification.

[27] The Government also may be able to authenticate the documents under Rule 902, which deals with self-authenticating public documents. However, because of our holding above, we will not consider this issue.

[28] The words of our Court of Appeals in *Stelmokas* apply with equal force here:

> We cannot conceive that any rational person would believe that someone set out to incriminate [the defendant] and planted fake documents in widely-scattered places for that purpose. If anyone created the documents to injure [the defendant], the fabricator most peculiarly placed the bulk of the documents in a location where they were not accessible to the public and from which, in fact, they were not released for decades. There certainly is no evidence in the record that anyone hatched such a bizarre plot.

2. *The Remaining Documents*

The remaining documents are admissible under Rules 901(b)(8) and 902. With respect to the judgments of the German courts,[29] all are admissible under Rule 902(3), dealing with self-authenticating foreign public documents, as all have the necessary apostilles. *See also* Fed. R. Civ. P. 44(a)(2). Furthermore, Dr. Sydnor testified that he believes that these are authentic copies of German court documents, that historians have relied extensively on them, and that no one has ever questioned their authenticity (and that there is no reason to do so). Thus, we also conclude that the court records are admissible under Rule 901(b)(8).

With respect to the statements and interrogations of other Totenkopf guards and the service card of Kotsch (Gov't Exs. 52, 56, 59, 71, 72, 87, and 107),[30] these documents clearly are admissible under Rule 901(b)(8), as there is nothing about them that is in any way suspicious and historians use them routinely without questioning their authenticity. In fact, one of these was used as a Nuremberg document, *see* Ex. G-59.

Finally, with respect to Exhibit G-26, the 1941 manual of service regulations for concentration camps,[31] Dr. Sydnor

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> ... [The defendant] was hardly a prominent figure in the war and it is difficult to conceive why someone would go to the lengths he suggests in order to frame him. [Defendant's] attack on the authenticity of the documents is not substantial.

100 F.3d at 313.

[29] The court documents—Government's exhibits 28, 30, 31, 32, and 51—are all from what were West German sources. G-30 is from Bonn, G-28 and G-32 are from the Central Office of the State Judicial Administrations in Ludwigsburg, and G-31 is from Düsseldorf. G-51 is a West German judicial judgment from the State Court of Münster.

[30] Exhibits 71, 72, 87, and 107 are from the Central Office of the State Judicial Administrations in Ludwigsburg. Exhibit 52 is from the State Attorney's Office in Köln, West Germany. And Exhibit 26 is from the Central State Archive of the October Revolution in Moscow.

[31] This document is also from the Central State Archive of the October Revolution in Moscow.

again testified that he has no doubt about the authenticity of the document and that no historian has ever called it into question. We therefore find it authentic under Rule 901(b)(8).

B. *Hearsay and Best Evidence Objections*

Szehinskyj argues that the offending documents are inadmissible hearsay. Included in his hearsay objection is a complaint that we have only been shown copies of the objected-to documents. However, under Fed. R. Evid. 1003, a "duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." As noted above, Szehinskyj has failed to raise a "genuine" challenge to the authenticity of the original documents. And it can hardly be argued that it would be "unfair" to admit the copy instead of the original, as the originals of most of these documents are more than fifty years old, in extremely delicate condition, and held under lock and key in various nations' archives. We therefore overrule any best evidence challenges to the admissibility of all of the documents.

We also overrule Szehinskyj's hearsay challenges to the documents, as they clearly are admissible under several exceptions to the hearsay rule. For example, Rule 803(16) provides an exception for "statements in a document in existence twenty years or more the authenticity of which is established." All of the objected-to documents are at least twenty years old, and we already have ruled that their authenticity has been established; thus, there is no doubt that they are admissible under this exception. *See Stelmokas*, 100 F.3d at 311-12 (holding that World War II-era documents from Lithuanian archives that demonstrated the defendant's employment and activities during World War II were admissible under Rule 803(16)).

Also, many of the documents (including the six documents that identify Szehinskyj, the regulation manual for concentration camps, and the service card of Kotsch) are admissible under Rule 803(6) as business records. That rule provides that

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of . . . [a] qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Dr. Sydnor testified at length about how the documents are akin to business records, in particular the personnel records of any large organization. He stated that they were necessary in order for the camps to function properly and outlined the circumstances surrounding their creation. We therefore overrule Szehinskyj's hearsay objection on this alternative ground. Many of the documents also are admissible under Rule 803(8), which provides for the admission of certain public records and reports. For example, the court documents fit within this exception. Finally, the documents are admissible under Rule 807, the general catchall hearsay exception, as all experts agree that they are highly reliable. For all of these reasons, we will deny Szehinskyj's motion *in limine* in its entirety.

V. Legal Basis for Denaturalization

A. The Government's Burden of Proof

As our Court of Appeals has noted, two "competing concerns" govern our review of this matter. *See Breyer*, 41 F.3d at 889. On the one hand, because "the right to acquire American citizenship is a precious one, and . . . once citizenship has been acquired, its loss can have severe and unsettling consequences," the Government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Fedorenko v. United States*, 449 U.S. 490, 505, 101 S. Ct. 737, 746 (1981) (internal quotation omitted). The evidence for revocation must be "clear, unequivocal, and convincing" and not leave "the issue in doubt." *Id.* (internal quotation omitted).

On the other hand, there must be "strict compliance" with the Congressionally imposed requirements for naturalization, and the failure to comply with any such requirement renders the naturalization illegally procured and subject to revocation under Section 1451(a) of the Immigration and Nationality Act. *See Fedorenko*, 449 U.S. at 506, 101 S. Ct. at 747; *see also Breyer*, 41 F.3d at 889.

B. The INA and the DPA

Szehinskyj, along with his wife and young daughter, entered the United States on November 24, 1950 under an immigrant visa issued to him pursuant to the DPA. *See* Ex. G-133 (Szehinskyj's immigration file). Section 13 of the DPA provides that:

> No visas shall be issued . . . to any person . . . who advocated or assisted in the persecution of any person because of race, religion, or national origin . . . .

The Government contends that because of Szehinskyj's service as a Totenkopf concentration camp guard, he was not eligible for a visa under the DPA. Thus, because he was not

lawfully admitted[32] to this country, he was not eligible for naturalization. *See* 8 U.S.C. §1427(a)(1).[33]

Our resolution of this matter therefore turns on whether Szehinskyj, as an alleged armed concentration camp guard, "assisted in the persecution of any person because of race, religion, or natural origin."

C. *Assistance in Persecution*

In *Fedorenko*, the Supreme Court addressed the DPA's locution "assisted in . . . persecution" in the denaturalization case of a Nazi concentration camp guard. The Court clarified that voluntary service is not necessary, nor is personal participation in atrocities. *See id.*, 449 U.S. at 512, 101 S. Ct. at 750. In the frequently cited footnote thirty-four of the Court's opinion, Justice Marshall wrote that:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

Id., 449 U.S. at 512, 101 S. Ct. 750.

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[32] Lawful admission requires a valid immigrant visa. *See Fedorenko*, 449 U.S. at 515, 101 S. Ct. at 751; *Breyer*, 41 F.3d at 889.

[33] This provision of the INA states that:

> No person . . . shall be naturalized unless . . . immediately preceding the date of filing his application for naturalization has resided continuously, *after being lawfully admitted for permanent residence*, within the United States for at least five years

8 U.S.C. §1427(a)(1) (emphasis added).

Many courts, including our Court of Appeals, have held that service as an armed concentration camp guard qualifies as assistance in persecution. *See Breyer*, 41 F.3d at 890 (holding that defendant, who served in the Waffen SS as an armed concentration camp guard, assisted in persecution under Section 13 of the DPA and stating that such assistance "does not require willing and personal participation in atrocities"); *United States v. Hajda*, 135 F.3d 439 (7th Cir. 1998) (affirming the district court's decision that an armed guard at Trawniki and Treblinka assisted in persecution); *United States v. Schmidt*, 923 F.2d 1253, 1259 (7th Cir. 1991) (holding that a member of the Death's Head Battalion who served as an armed, uniformed guard at Sachsenhausen assisted in persecution); *Kairys*, 782 F.2d at 1377 n.3 (holding that a prisoner of war who was recruited to serve as a guard at Treblinka assisted in persecution); *United States v. Hutyrczyk*, 803 F. Supp. 1001, 1009-10 (D.N.J. 1992) (holding that an armed guard at a labor camp assisted in persecution).

VI. Szehinskyj's Assistance in Persecution

A. *The Documents*

The six Nazi wartime documents that mention Szehinskyj are clear, unequivocal, and convincing evidence that he assisted in persecution within the meaning of the DPA. As we note below, they are perhaps the most reliable evidence possible, since they, unlike memories, have not faded with time.

Each of the six documents identifies Szehinskyj not only by name, but also by at least one other identifying characteristic. *See generally* Ex. G-123 (the "points of corroboration" chart). The Change of Strength Reports and the Transfer Order list Szehinskyj's first and last name, rank (*Schütze*, or private), and date of birth (February 14, 1924). *See* Exs. G-45, G-61, G-62, and G-64. The September 29, 1943 Troop Muster Roll lists his first and last name, rank, date of birth, place

of birth (Malnow, in the Lvov District of Poland), religion (Greek Catholic), marital status (single at the time), mother's name and address (Paraskewia Szehinski, Malnow, Lvov District), occupation ("Cobbler/Agricultural laborer"), date of induction into the Waffen SS (January 15, 1943), SS transfer and unit information, and a personal description (170 cm. tall, slender build, dark blond hair, grey-green eyes, "normal" nose, no beard, no marks, and a broken German dialect). *See* Ex. G-44. The second Troop Muster Roll, completed sometime after May 4, 1944, lists the same first and last name, rank, date and place of birth, religion, marital status, and name and address of mother. It lists Szehinskyj's occupation only as "cobbler". *See* Ex. G-63.

These documents not only are consistent with one another, they are consistent with the information Szehinskyj provided to the Displaced Persons Commission ("DPC") and the United States when applying for a DPA visa and for naturalization. For example, he stated in his application to the DPC that he was born on February 14, 1924 in "Mavniw, Poland",[34] and that his occupation was farmer. *See* Ex. G-133, at 28. The certificate of birth and baptism attached to his application lists his mother's first name as "Parasceva". *See id.* at 33.

Furthermore, the documents are consistent with Szehinskyj's trial testimony and with the facts to which he has stipulated, to wit, that: (1) he was born on February 14, 1924 in Malnow, Poland; (2) his mother's first name was Parasceva, and she lived in Malnow; (3) he is a Byzantine Catholic, which is also called Greek Catholic; (4) he worked as a farmer; (5) a man he met on a train told him to identify himself as a cob-

[34] A common spelling of "Malnow".

bler to avoid farm work;[35] and (6) he was married after the war, in 1947. Also, much of the physical description in the documents matches Szehinskyj's characteristics, *e.g.*, height,[36] build, hair and eye color, and absence of "marks".

The documents also are consistent with Szehinskyj's Nazi-issued *arbeitskarte*, *see* Ex. G-24, which he brought with him to his deposition and which on its face expired on January 31, 1943. Dr. Sydnor testified that it would have been extremely dangerous for Szehinskyj to be found with an expired *arbeitskarte* since, during the Nazi regime, a person found without valid "papers" had no identity or would be deemed a contract-breaker, both of which could result in incarceration in a concentration camp. As Dr. Sydnor stated, this threat of punishment was a "powerful incentive for workers to legitimize themselves".[37] Given the life-and-death stakes,

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[35] This fact, in particular, casts serious doubt on any contention that Szehinskyj was the victim of identify theft, as it effectively limits to a group of one the persons who could have committed the theft, *i.e.*, the other party to the conversation. Szehinskyj never actually worked as a cobbler.

[36] The Troop Muster Roll lists his height as 170 centimeters. Various documents in his immigration file list his height as five feet, eight inches, or sixty-eight inches. Sixty-eight inches converts to 172 centimeters.

[37] In response to Szehinskyj's suggestion that such risks were not generally known, Dr. Sydnor pointed out that, while some of these Nazi policies were intended to be secret, they did become widely known through the "grapevine." For example, he noted that the term "Final Solution", which was intended to be classified, quickly found its way into ordinary German discourse after the infamous Wannsee Conference that Reinhard Heydrich, Himmler's deputy and head of the Reich Security Main Office, convened on January 20, 1942. The reliability of this grapevine was shown when the very locution "Final Solution" found its way in letters between ordinary German civilians shortly after January 20, 1942.

There is no doubt that Szehinskyj was aware of the importance of maintaining a valid *arbeitskarte*, as he testified that, before leaving the labor office in Krems, an official explained the rules and regulations of his situation to him. Dr. Sydnor also testified that Eastern workers, during the registration process, were told in no uncertain terms about the importance of the *arbeitskarte*. And as its possession or lack thereof was matter of life or death in the Third Reich, it is inconceivable that anyone would move about this police state without valid "papers".

it is implausible to accept the notion that Szehinskyj simply would have ignored the fact that he needed an *arbeitskarte* or the expiration date on it.

Szehinskyj makes much of the fact that there is no live evidence in this case—for example, no camp survivors have identified him as a former Totenkopf guard. Given that more than fifty years have passed since the Third Reich's demise, Szehinskyj obviously looks quite different now than he did at age nineteen—as a comparison with his photograph from 1958 on his certificate of naturalization shows—and we would be most skeptical of any eyewitness who would point a finger at Szehinskyj in an American courtroom in 2000.

We also note that the fact that some of the documents spell Szehinskyj's name differently[38] is accounted for in the record, through Szehinskyj's own admissions and stipulations. The "agreed facts" section of the Joint Pretrial Stipulation quotes Szehinskyj's deposition, at which he stated that "It's now spelling in Europe, that's the whole problem, just pronunciation, and they write what they want." Joint Pretrial Stip. at 23. He was referring to the fact that Ukraine uses the Cyrillic alphabet, which differs markedly from our own Latin alphabet. Furthermore, his own documents show that he signed off on Latinized spellings of his name. *See, e.g.,* Ex. G-124, Tab 2 (Szehinskyj's's Prepatory Commission—Internal Refugee Organization ("PCIRO") application for assistance, which he has admitted to signing and which spells his name "Fedor Szehinski"). And he has stipulated that the post-war documents that contain various spellings of his name apply to him. Thus, the fact that the documents contain different spellings of "Szehinskyj" is of no moment.

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[38] For example, the May, 1944 Troop Muster Roll lists his name as, "Szehinski", while the Change of Strength Reports list it as "Szehinsky".

In short, we have no doubt that the Theodor Szehinskyj mentioned in these six Nazi wartime documents is our defendant.

B. *Frau Lechner's Testimony*

Both parties agree that Szehinskyj spent time on the Lechner farm. The Government, however, claims that he left that farm before January of 1943, while he claims to have remained there until November of 1944.

We have read the English language transcript and viewed the videotape of Frau Lechner's *de bene esse* deposition. *See* Ex. G-25. As an initial matter, we note that Frau Lechner was a completely credible witness and was remarkably exact in her answers. She has a precise recollection of dates. For example, she recalled the date on which her husband left for the army (October 5, 1940) and the time he took a vacation in 1942.[39] We credit her testimony in its entirety.

Frau Lechner's testimony simply does not support Szehinskyj's story. She testified that Szehinskyj worked on her farm "from February, 1942 until the late summer of that year." *Id.* at 16; *see also id.* at 20 ("I didn't want to hold him back, but I had to get another laborer because Theo wanted to go"); *id.* at 22 ("[H]e was no longer there in 1943. I had another Pole to help me"); *id.* at 23 (stating that she never saw Szehinskyj after 1942). At least eleven times during her deposition, Frau Lechner stated that Szehinskyj left her farm after the harvest in 1942. As we noted above, she first volunteered the dates on which Szehinskyj worked on her farm, and she remembers that his replacement was "Rudolf" or "Rudek", "another Pole".[40]

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[39] While there is some ambiguity in the transcript about the date of her husband's return home on leave, this is removed on page twelve. *See* Ex. G-25, at 12.

[40] Frau Lechner actually remembers all of the workers on her farm during the war years. She first had laborers from the Hitler Youth who helped during

Also, as noted above, Frau Lechner remembers the specific details of Szehinskyj's departure, including the fact that he walked away with his shoes over his shoulder. If Szehinskyj had left the farm in November, as he testified, instead of the late summer, as Frau Lechner remembers, it is unlikely that he would have walked away barefoot through the chilly Austrian mountain countryside. Szehinskyj himself testified that the high-altitude Schiltern area often had snow on the ground in October.

It is also noteworthy that Szehinskyj testified that he never discussed the Battle of Stalingrad with Frau Lechner, though she repeatedly (and very emotionally) states in her deposition that her husband was missing in Stalingrad as of early 1943. According to Szehinskyj, during 1943 Frau Lechner complained about not receiving letters from her husband and worried that he was "kaput", but never mentioned Stalingrad to him. It is inconceivable to us that Frau Lechner would have failed to mention Stalingrad during these conversations about her husband's whereabouts, as the place clearly is synonymous to her with her husband's untimely death. Indeed, she mentioned that city eleven times during her deposition, as though she defines her wartime experience through the shorthand of "Stalingrad". Thus, Szehinskyj could not have been on the Lechner farm after January of 1943, when Frau Lechner learned about the loss at Stalingrad and its consequence to her.

Frau Lechner testified that the mayor of Schiltern, Josef Maurer, registered her with the Krems labor office so that she could receive a worker. Dr. Sydnor testified that a benefactor such as Maurer, who had to have been appointed or at

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busy harvests, then Szehinskyj, then "Rudolf" or "Rudek", and finally Rene, a Frenchman.

least approved by the Third Reich and be a member of the Nazi Party, most likely would have had no trouble renewing an expiring *arbeitskarte*. In fact, if Maurer had a telephone, he could have done it with a simple phone call.[41] Thus, it is inconceivable that Frau Lechner risked her own safety, as well as Szehinskyj's, by letting the card lapse.

There is simply no reason to believe that, nearly sixty years after she last saw Szehinskyj, Frau Lechner perjured herself in sworn testimony before a judge merely to hurt Szehinskyj. There is no evidence in the video of any animus whatsoever toward Szehinskyj. In fact, she stated that she treated him as a member of her family.

Finally, we note that Szehinskyj is the one who brought Frau Lechner into this case. It was he who supplied her name to the Government as an alibi from his very first filing after the war to his sworn statement in 1997. Thus, any contention that Frau Lechner is out to get Szehinskyj is completely unfounded.

Szehinskyj has attempted to cast doubt on Frau Lechner's testimony by arguing that she does not want to be forced to compensate him for his slave labor on the farm. There is no evidence at all in the record to substantiate this speculation, and Szehinskyj's counsel did not question Frau Lechner about this subject during the deposition. Also, Szehinskyj admitted on his PCIRO application Frau Lechner *did* pay him—he stated that he received thirty *Deutschmarks* a month for his services on the farm from February of 1942 through March of 1945 (though he testified at trial that he received nothing), *see* Ex. G-124, tab 2.[42] Thus, Frau Lechner's hypothesized bias is a figment of advocacy.

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[41] Provided, of course, that there were no questions about or problems with the laborer at issue.

[42] Frau Lechner recalled that she paid him the forty *Deutschmarks* a month she got from the Reich. Ex. G-25 at 17.

In sum, Frau Lechner's testimony is unwittingly self-corroborative, and we accept all of it.

C. Szehinskyj and His Testimony

In addition to the compelling evidence discussed above, which by itself would suffice to find that Szehinskyj served in the Totenkopf, we also find support for our decision from Szehinskyj himself.

First, Szehinskyj testified that he could not hold or fire a gun because of the 1939 scythe injury to his right hand. However, he admits to performing all kinds of manual labor after the alleged 1939 accident, including farm work, wood chopping (which required him to use an axe), and serving as a United States Army mechanic (which required him to operate stick-shift vehicles with his right hand). He also served as a policeman at displaced persons camps at Vilseck, Amberg, and Neumarkt in the years after the war and as a guard on the *S.S. General Sturgis,* the ship on which he travelled to America.[43] When he arrived in the United States, he again served as a farm worker and admits to driving a tractor with a rifle on the back. After that, he worked as a mechanical technician for the General Electric Company and had to use screwdrivers and adjustable wrenches. He admitted that he could do little of this with his left hand. Also, in his application to file a petition for naturalization, he stated that he would be willing to "bear arms" on behalf of the United States. *See* Ex. G-133, at 9.

If the foregoing were not enough to refute Szehinskyj's contention that he could not hold a gun, we also have a statement from an American doctor who examined Szehinskyj in

[43] The very fact that Szehinskyj, supposedly for the first time in his life, worked as a policemen or guard almost immediately after the documents demonstrate his SS service coming to an end is further support for the Government's claims. The logical inference is that Szehinskyj found work that was benignly similar to what he had done for the Waffen SS for over two years.

connection with his applications for naturalization. The report of Dr. Kehl states that his examination did not reveal evidence of any "physical defect which might affect [Szehinskyj's] ability to earn a living". Ex. G-133, at 32. As Szehinskyj was indisputably a manual worker, Dr. Kehl's report is solid evidence that our defendant was able to use at least one hand with dexterity.[44]

Second, there are many internal inconsistencies in Szehinskyj's testimony. For example, he testified repeatedly on direct examination that he never saw his *arbeitskarte* before Frau Lechner gave it to him upon his departure in late 1944. On cross-examination, however, he admitted that he signed the card in 1942, at the Krems labor office. He also, at several points during cross-examination, attempted to disavow his own documents, for example by denying that he signed his application for assistance to the PCIRO, Ex. G-124, tab 2. His attorney had to correct his testimony by stipulation after a recess. Szehinskyj testified that Frau Lechner did not treat him well, but later on he stated that she gave him a blanket and a large piece of bread when he left the farm. And he stated on the PCIRO documents that he left the Lechner farm in February or March of 1945, *see, e.g.*, Ex. G-124, tab 2, but he told us last week that he left in November of 1944. These many inconsistencies, of which we have mentioned only a few, cast doubt on all of Szehinskyj's testimony.

Third, Szehinskyj's story regarding his extensive travel throughout the Third Reich with an expired *arbeitskarte* af-

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[44] While it is true, as Dr. Sydnor testified, that the SS required its guards to be in good physical condition, Szehinskyj had every incentive to downplay any injury to his hand, as he could greatly improve his situation if he were accepted into the SS. On the other hand, Szehinskyj would have benefitted from any *slight* impairment, since Dr. Sydnor testified that Totenkopf men in the best physical condition were sent to the front.

ter leaving the Lechner farm in November of 1944 is completely incredible. Dr. Sydnor testified that without valid papers, a person had no identity and thus was likely to land in a concentration camp after being stopped by the Gestapo (a regular occurrence). *See, e.g.*, Ex. G-18 (a document, dated one month before Szehinskyj joined the Totenkopf, from the chief of the Gestapo authorizing the incarceration of an additional 35,000 people, including those who broke labor contracts, *i.e.*, had invalid work papers).[45] An invalid *arbeitskarte* was evidence that the person had broken a labor contract, another "crime" that could result in camp imprisonment and death. Particularly during the last phase of the war, being caught without valid papers was "lethal", according to Dr. Sydnor, as control over the movement of people tightened even further and roving groups of security forces conducted summary courts-martial and executions of those whose papers were not in order. Dr. Sydnor stated without qualification that if one was in an area under the Third Reich's authority without valid papers, one took one's life in one's hands. He also noted that this danger was (understandably) well-known to the populace.

It is also implausible that Szehinskyj found people who would employ him with expired papers. To have done so would have exposed employers to the risk of punishment at the hands of the Reich's ubiquitous security forces.

Just as incredible is Szehinskyj's contention that he never saw his *arbeitskarte* until the day he left the Lechner farm, since he testified that he made occasional trips off of the farm both with and without Frau Lechner. Given the Gestapo's practice of stopping pedestrians, demanding to see their "papers", and arresting them if the papers were not satisfactory,

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[45] Incidentally, Dr. Sydnor testified that, after this memorandum was issued, there was an increase in the number of Eastern European guards.

it would have been virtual suicide for Szehinskyj to leave the farm without valid identification.

Fourth, Dr. Sydnor testified that members of the Totenkopf were given a small tattoo indicating their blood type at the base of their bicep on the underside of their left arm. He also stated that it was common for Totenkopf members to have former SS doctors remove their tattoos as soon as possible after the war, as a tattoo would have been proof positive of their activities during the Third Reich. During an *in camera* inspection of Szehinskyj's left arm, we discovered that he has a 3/8-inch-long scar on his left arm, just above his elbow. The scar, which clearly is not the result of an incision, is large enough to have contained the one or two letters of Szehinskyj's blood type.

Finally, though he tried to deny it during his testimony, Szehinskyj reported to the PCIRO in March of 1948 that, between March and November of 1945, he was a farm worker in Schönsee, Germany. *See* Ex. G-124, tab 2. The parties have stipulated that Schonsee is seventeen miles from Flossenbürg, which the Government's documents demonstrate is where Szehinskyj ended up after the prisoner transport to Mauthausen in February of 1945. Szehinskyj has thus placed himself only miles from where the Government claims the Nazis transferred him when the war in Europe neared its end, thereby unwittingly corroborating the Government's account and, more particularly, Exhibit G-64.[46]

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[46] Szehinskyj told the PCIRO that he began work in Schönsee in March of 1945. Dr. Sydnor stated that, although it is not entirely clear when Flossenbürg was liberated, it most likely was emptied in April of 1945. This discrepancy can be explained in several ways. Szehinskyj could have falsified the date on the PCIRO form, or it could simply be a mistake. Also, Dr. Sydnor testified that some Totenkopf guards deserted as the end of the war approached when it became clear that the Allied forces would treat any captured Waffen SS soldiers harshly (in large part because of the Allies' horror at the concentration camps they stumbled onto in

Szehinskyj has attempted to raise as a defense the possibility that someone may have stolen his identity during the war years. He testified about various conversations he had with different people, for example a conversation with another kidnapped laborer on the train to Krems. We reject this argument based on the sheer volume of biographical data about Szehinskyj contained in the documents. It is implausible (to say the least) that an identity thief gathered enough information (all of it correct) about Szehinskyj during one of these conversations to fool the Nazis. It is even more implausible to believe that this thief also matched Szehinskyj's precise physical description.

We also reject the argument that even if Szehinskyj is the man named in the documents, there is no evidence that he himself did anything wrong. This contention misses the point of Section 13 of the DPA. Even if Szehinskyj never physically harmed a camp inmate (an unlikely prospect, given the horrific camp regulations and practices discussed above), his very role at the camp was to assist in persecution. He was a guard, and his job was to prevent inmates from escaping. This is enough to "assist" in persecution.

We therefore without hesitation conclude that our defendant is the Theodor Szehinskyj mentioned in the Nazi documents as an armed Totenkopf concentration camp guard. By definition, the Totenkopf assisted in persecution of Jews and others considered racially inferior or "defective". The concentration camp guards all carried guns and were under strict orders to use them. Thus, we find that Szehinskyj was not eligible for a visa under the DPA, *see, e.g., Fedorenko,*

April of 1945). In any event, this minor discrepancy does not create a moment of doubt when compared to the mountain of evidence confirming Szehinskyj's Nazi service.

449 U.S. at 512, 101 S. Ct. at 750; *Breyer,* 41 F.3d at 889-90, and thus he could not have been lawfully naturalized in 1958.

VII. Time's Rude Hand

Fifty-five years is a very long time in one man's life. This is the span since the last Nazi concentration camp closed and this trial began. Given how far this case takes us into the past, some may well criticize this prosecution (to say nothing of this decision) based on the sheer passage of time alone.

Notable among such critics is Judge Ruggero Aldisert, of our Court of Appeals, who dissented in *Stelmokas*. Though noting in that dissent his service in World War II and his abhorrence for the atrocities of the Third Reich, Judge Aldisert nevertheless was profoundly troubled by the due process implications of the extraordinarily long time between the events of the Nazi regime and the institution of an action much like the present one:

> In American jurisprudence there is no analogue to permitting a trial on events that occurred a half-century in the past. Indeed, with the exception of murder cases, all criminal and civil proceedings are rigorously circumscribed by fixed statutes of limitations. Such statutes preclude the institution of criminal or civil complaints after a finite number of years. Similarly, in equity petitions, stale actions are barred by the doctrine of laches.
>
> The policy that undergirds our statutory and judicial limitations on such actions is rooted in an understanding that with the passage of time, witnesses disappear and memories fade. Such a policy reflects appreciation for the reality that, because our memories are fragile and inevitably compromised by the ravages of time, at some point they can no longer be considered trustworthy for presentation under oath as "the truth, the whole truth and nothing but the truth." . . .

> Given contemporary concepts of due process, it is doubtful that one could be tried in 1996 for a murder that took place in 1941. Nevertheless, the judiciary continues to permit the prosecution of stale denaturalization cases like this one.

Stelmokas, 100 F.3d at 342-43.[47]

Notwithstanding the force of Judge Aldisert's due process objections, there are at least three answers to his concerns, one rooted in the particulars of Szehinskyj's, case, and two others rooted more generally.

As applied to Szehinskyj, Judge Aldisert's legitimate concern that "our memories are fragile and inevitably compromised by the ravages of time", *id.* at 342, simply does not apply. If the record against Szehinskyj were based solely on, say, eyewitness testimony, Judge Aldisert's concern would be especially troubling.[48] As is by now clear, however, nothing in this prosecution depends on anyone's live memory. Szehinskyj has been convicted by incontrovertible documents, all but one of which did not see the light of Western eyes until after the collapse of the Soviet Union on December 31, 1991. These wholly consistent ancient documents, having reposed for over fifty years in Moscow, Kiev, and Berlin, leave no doubt that this Theodor Szehinskyj was a member of the Totenkopf battalion at the Gross-Rosen, Sachsenhausen and Warsaw concentration camps, and almost certainly at Mauthausen and Flossenbürg as well. From January of 1943 through at least April of 1945, Szehinskyj was thus part of the Totenkopf guard in at least three venues of the Final Solution.

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[47] Szehinskyj did not raise a due process objection, but asserted laches as an affirmative defense. He did not, however, mention this defense at trial.

[48] Query how reliable any eyewitness could be identifying an unnamed guard fifty-five years beyond his early manhood.

Ironically, the one live witness who might have supported Szehinskyj's alibi did quite the opposite. Frau Lechner's exact recollection of the years in question effectively confirms the significance of the January 31, 1943 expiration date on Szehinskyj's *arbeitskarte*. Had Frau Lechner not lived, her absence would have provided Szehinskyj with the claim that time took his alibi witness from him, and thus would have lent force to Judge Aldisert's evidentiary concerns. As it turns out, however, time has been especially rude to Szehinskyj, not only in the survival of such incriminating documents, but in the vivid and detailed memory of this eighty-eight year-old survivor of the Nazi era, as she pictured him on a day in 1942, walking barefoot away from her and her waving daughter, his shoes draped over his shoulder.

There are, beyond the particulars of Szehinskyj's case, two more general responses to Judge Aldisert's concerns.

As Judge Aldisert notes, all crimes have statutes of limitations, with "the exception of murder cases." *Id.* at 342. Toward the conclusion of Dr. Sydnor's testimony, he referred to the concentration camps evolution into a "closed culture of murder". The understated Dr. Sydnor did not lapse into hyperbole with this memorable phrase. The documentation admitted in evidence leaves no doubt that the camps were a thoroughly considered, meticulously organized enterprise of state-sponsored murder. The regulations that Heinrich Himmler himself inaugurated, and which his chief acolytes Theodor Eicke and Oswald Pohl embroidered, ordained a system that welcomed brutality and sanctioned mercy among the Totenkopf guards. Dr. Sydnor testified that no guard was ever so much as reprimanded for shooting an inmate when he should not have. By contrast, guards who withheld sanctions of inmates risked discipline from their superiors.

Those same regulations make it clear that no guard could long remain on the periphery of this closed culture. The practice of the Waffen SS was that Totenkopf guards every day were given new assignments, and none could plausibly contend that he spent the war merely watching from the edge. Thus, the heavy presumption from this incontrovertible historical record is that guards were, at a minimum, complicit in this closed culture of murder even if there may not be hard evidence of actual homicide at a particular guard's hands.

Actions like this one, therefore, are in their macabre way akin to murder prosecutions.

In addition to the language quoted above, Judge Aldisert, referring to the defendant in *Stelmokas,* thought that "[t]o continue the prosecution of octogenarians (and soon nonagenarians) is, to be sure, a political decision." *Id.* at 343. With deference, such prosecutions involve much more than "a political decision". Memory, after all, involves the often difficult enterprise of not forgetting. If the Government were to forget—and by its forgetting, effectively absolve—our fellow citizens participation in the Third Reich's closed culture of murder, it would be making much worse than a bad "political decision". It would, by such forgetting, dishonor Sidney Glucksman, Rudolf Herz, Karl Schlesinger and Marion Wojciechowski, and the millions of other victims—some living, but most dead—of the greatest moral catastrophe of our civilization.

We thus cannot fault the Government when it remembers.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA
UNITED STATES OF AMERICA

v.

THEODOR SZEHINSKYJ
CIVIL ACTION
NO. 99-5348

ORDER AND JUDGMENT

AND NOW, this 24th day of July, 2000, for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. JUDGMENT IS ENTERED in favor of plaintiff the United States of America and against defendant Theodor Szehinskyj;

2. Defendant's United States citizenship is REVOKED;

3. The March 13, 1958 Order of the Court of Common Pleas of Delaware County admitting defendant to United States citizenship is VACATED;

4. Defendant's Certificate of Naturalization, No. 7836667, is CANCELLED, and defendant shall forthwith deliver the certificate, his United States passport, and any other indicia of United States citizenship to the Attorney General or her designee; and

5. Defendant is forever ENJOINED from claiming any rights, privileges, benefits, or advantages under any document evidencing United States citizenship.

BY THE COURT:
/s/Stewart Dalzell, J.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-2467

UNITED STATES OF AMERICA
v.
THEODOR SZEHINSKYJ
a/k/a
FEDOR SZEHINSKI
a/k/a
THEODOR SZEHNISKIJ
a/k/a
THEODOR SZEHINSKY
a/k/a
THEODOR SZEHINSKI
a/k/a
THEODOR SZEHNKYJ
THEODOR SZEHINSKYJ,
Appellant

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit* Judges.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for re-

hearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:
/s/Maryanne Trump Barry
Circuit Judge

DATED: APR 3 2002

CH/cc:
AM
DWF
RJG
WHVK